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No. _____

In The

Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED FOR REVIEW

Does a federal district court lose its jurisdiction under 28 U.S.C. § 1331 to hear a claim that federal law preempts official action if the plaintiff also alleges that the official action is not authorized under state law?

PARTIES

The caption of the case contains the name of all parties to the case. Petitioner, Fleet Bank, National Association is associated with only one publicly-traded corporate entity, its corporate parent, Fleet Financial Group, Inc. Petitioner has no nonwholly owned subsidiaries.

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Fleet Bank, National Association respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix ("App.") at A1-A24) is reported at 160 F.3d 883 (2d Cir. 1998). The opinion of the District Court (App. at A35-A48) is reported at 23 F. Supp. 2d 196 (D. Conn. 1998).

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on November 9, 1998. On January 14, 1999, the Court of Appeals by order granted rehearing in limited part but substantially denied rehearing, leaving its earlier disposition intact. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

The following statutes and regulations are reprinted at App. at A58 - A76: 12 U.S.C. §§ 24 (Seventh), 36(f), 484(A), 1818(b), 1818(h)(2) (1998); 28 U.S.C. §§ 1331, 1367 (1998); 12 C.F.R. § 205.9(a)(1) (1999); 12 C.F.R. § 7.1019 (1998); 12 C.F.R. § 7.4002 (1998); and Conn. Gen. Stat. §§ 36a-50, 36a-156 (1999).

STATEMENT OF THE CASE

Petitioner Fleet Bank, National Association ("Fleet"), is a national banking association organized under the National Bank Act, 12 U.S.C. §§ 21-216d. As a national bank, Fleet possesses "all such incidental powers as shall be necessary to carry on the business of banking", 12 U.S.C. 24 (Seventh), which include

charging fees for the use of its automated teller machines ("ATMs").[1] The underlying issue in this dispute is whether Connecticut officials may lawfully prohibit Fleet from charging a $1 convenience fee to individuals who do not bank at Fleet but wish to use its ATMs to access accounts in other financial institutions.[2]

The stakes in this dispute are considerable. On the one hand, Fleet projects 15,000 daily transactions by non-Fleet customers at its ATM machines; to forgo the fee thus costs Fleet $15,000 a day (App. at A100), or $5,475,000 annually. On the other hand, Connecticut law authorizes a civil penalty of $7,500 "per violation" of state banking laws, Conn. Gen. Stat. § 36a-50 (1999), a potential penalty of staggering proportion if a violation occurs each time a fee is imposed. (App. at A123.)

On September 14, 1995, the Respondent Burke, Connecticut's Commissioner of Banking, opined that a Connecticut statute[3] requiring banks to make their ATMs accessible to other banks on a nondiscriminatory basis, and authorizing the owner of the ATM to charge a fee to the accessing banks, implicitly prohibits charging a convenience fee directly to the ATM user. (App. at A97-A98.) The Commissioner further stated that the ban applies fully to national banks. (*See* App. at A98.)

Seeking to secure its federal right to impose a convenience fee and to resolve the legal uncertainty surrounding the

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[1] *See* 12 C.F.R. § 7.1019 (1998) (authorizing national banks to use electronic means, such as automated teller machines, to conduct business); *id.* § 7.4002 (permitting national banks to impose charges, other than interest, for services banks provide); *id.* § 205.9(a)(1) (allowing ATM convenience fees upon proper disclosure).

[2] The Office of the Comptroller of the Currency, which regulates national banks, has confirmed that the imposition of such a fee by a national bank "is authorized under federal law." Brief *Amicus Curiae* of the Office of the Comptroller of the Currency at 3, *Fleet Bank, Nat'l Ass'n* v. *Burke*, 160 F.3d 883 (2d Cir. 1998) (No. 98-9324).

[3] Conn. Gen. Stat. § 36a-156 (1999) (App. at A76)

Commissioner's claim that Fleet could be sanctioned for charging that fee, Fleet sued the Commissioner[4] in District Court, requesting declaratory and injunctive relief. The complaint asserts that (1) the National Bank Act, 12 U.S.C. § 24 (Seventh), and applicable federal regulations preempt any state ban on ATM convenience fees as applied to national banks, and (2) Connecticut law, correctly interpreted, does not prohibit convenience fees. (App. at A80-A82.) Jurisdiction was premised on the federal question statute, 28 U.S.C. § 1331. (App. at A78.)

The Commissioner moved to dismiss the action based on the abstention doctrine of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The district court denied the motion, finding abstention inappropriate for two independent reasons: the "defendants [did] not make a sufficient showing that the state ATM statutes are unclear, and plaintiff's preemption claim does not present a federal constitutional issue." (App. at A51-A57.)

Thereafter, the parties and the District Court agreed first to determine whether Connecticut law prohibits convenience fees, and then, if necessary, to reach the preemption issue. (App. at A87.) After cross-motions for summary judgment on the state law issue, the District Court ruled on September 30, 1998, that the Connecticut ATM access statute does not prohibit convenience fees. (App. at A35-A48.) Judgment was entered in favor of Fleet. (App. at A49-A50.)

On appeal, the Commissioner argued for the first time that the District Court lacked subject matter jurisdiction. (App. at A5-A7.) In particular, the Commissioner contended that Fleet's preemption claim in effect anticipated a federal defense to a possible action by the Commissioner to enforce the purported ban of the Connecticut ATM statute, and that, under the well-pleaded complaint rule, such a "defense" did not give rise to federal question jurisdiction under § 1331. (*Id.*)

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[4] Also named as a defendant was the Connecticut Department of Banking. For convenience, we refer to the defendants collectively as the Commissioner.

The Court of Appeals for the Second Circuit did not endorse that view, but ultimately agreed that subject matter jurisdiction was lacking--for a novel reason never suggested by the Commissioner. Though acknowledging that a federal court ordinarily has jurisdiction over a claim that a state official's threatened action is preempted by a federal statute, the court below found subject matter jurisdiction wanting because Fleet's complaint also alleged that the Commissioner's threatened action was not authorized by state law. (App. at A9-A24.) Thus, Fleet, by virtue of having included its supplemental claim that the Commissioner lacked authority under state law to seek sanctions for imposition of the dispute fee, was relegated to state administrative and judicial proceedings. Invoking *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), the Court of Appeals also held that Fleet could reserve its preemption claim for federal court if it lost in the state proceedings. (App. at A24.) Accordingly, the Second Circuit vacated the District Court's judgment and remanded the case with instructions to dismiss for lack of subject matter jurisdiction. (*Id.*) Notably, the Second Circuit explicitly reserved the question whether subject matter jurisdiction would exist had Fleet's complaint asserted only its federal claim under the national banking laws. (App. at A23 n.8.)

Fleet's petition for rehearing was supported by the Office of the Comptroller of the Currency as *amicus curiae*. (*See* App. at A26.) The Court, however, essentially denied the motion for rehearing,[5] but in its order reiterated that its decision was "not intended to deny the District Court any jurisdiction, otherwise available, over a complaint that omits a claim requiring construction of state law." (*Id.*)

Fleet had not implemented an ATM fee after prevailing in the District Court, for the Second Circuit on October 12, 1998 issued a temporary "stay in the nature of an injunction" pending oral argument. (App. at A31-A32.) When the Court of Appeals

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[5] Rehearing was granted to the limited extent of modifying one sentence in the original panel opinion.

refused to extend that stay beyond October 23, 1998, Fleet implemented the disputed fee, as did at least two other national banks serving Connecticut. Immediately after the Second Circuit's decision, Fleet and another national bank sued in District Court (the "November suits"), seeking to enjoin the Commissioner from proceeding with administrative enforcement proceedings: this second action omits any claim under state law, resting exclusively on the claims that under federal law national banks have the right to charge these fees and the Comptroller of the Currency has the exclusive power to enforce laws against national banks, including any state law prohibition on ATM convenience fees (App. at A102-A111).[6] Meanwhile, on November 10, 1998 -- well over a month after the District Court entered judgment on the merits in favor of Fleet -- the Commissioner issued a cease and desist order against Fleet (with which Fleet complied), and set a date for a hearing on the imposition of civil sanctions for alleged violations of Connecticut law during the period when the convenience fee was in effect. (App. at A116-A125.) The Office of the Comptroller of the Currency ("OCC") has since intervened as a plaintiff in the November suits and has requested a preliminary injunction prohibiting any state enforcement proceedings against Fleet and the national banks. (*See* App. at A112-A129.) The District Court recently granted the OCC's motion. (App. at A130-A164.)

REASONS FOR GRANTING THE WRIT

Lawsuits alleging that a federal statutory or constitutional provision pre-empts state or local official action are commonplace and unquestionably fall within federal court subject matter jurisdiction. Also commonplace are suits like the one filed by Fleet, in which a complaint alleging federal preemption includes a supplemental state law claim challenging the lawfulness of the same official action. Congress, in enacting the federal question and the supplemental jurisdiction statutes, 28 U.S.C. §§ 1331,

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[6] *See National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980); 12 U.S.C. §§ 36(f), 484(a), 1818(b), 1818(h)(2).

1367, has plainly conferred on the District Courts subject matter jurisdiction to hear actions like Fleet's. Until the Second Circuit's decision, to our knowledge no federal court ever suggested that a district court's jurisdiction to hear an injunctive action asserting that state or local official action is federally pre-empted evaporates if the plaintiff also asserts, as part of the same case or controversy, a closely-related state law claim. The Second Circuit's opinion concedes that no authority supports its novel position. (*See* App. at A2, A15).

The Second Circuit's decision not only departs sharply from well-established principles of federal jurisdiction; it has potential impact throughout the vast domain of federal statutory pre-emption claims against state and local governmental actions. If left unreviewed, the decision would have serious repercussions, requiring plaintiffs with substantial challenges to official action under both federal and state law either to give up their congressionally-established right to a federal forum or to split their claims between state and federal tribunals, with all of the resulting inefficiencies and potentials for conflict. Those reasons alone would justify granting the writ of *certiorari*.

In addition, the need to maintain uniformity in the interpretation of federal law governing subject matter jurisdiction also justifies granting the writ. For the Second Circuit's decision conflicts with decisions in at least nine other federal circuits, as well as a multitude of district courts, upholding a plaintiff's right, when challenging state or local official action under §§ 1331 and 1367, to join a supplemental state law claim to a claim of federal statutory pre-emption .

Finally, the decision below fails to respect congressional supremacy in determining the jurisdiction of the federal courts. Congress has plainly conferred jurisdiction under §§ 1331 and 1367 over an action like Fleet's. Whether that decision was a wise one, given how busy the federal courts are, is a question for Congress, not for the Second Circuit, to resolve. *Cf., e.g., Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336 (1976) (reviewing and reversing district court's remand of removed case because its docket was too full.)

I. The Decision of the Court of Appeals Conflicts with Longstanding Judicial Practice and Decisions of this Court on an Important Question of Federal Jurisdiction

For at least 90 years, the federal courts have routinely entertained actions alleging that state or local official action is (1) in conflict with a federal statutory or constitutional provision, and (2) in any event not authorized by, or otherwise prohibited under, state law. As the Court held in *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909), federal question jurisdiction attaches in such a case because of the claim that the state action violates federal law--and once jurisdiction has attached, the federal court "ha[s] the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omit[s] to decide them at all, but decide[s] the case on local or state questions only." *Id.* at 191. Such two-pronged attacks have long been familiar,[7] and the Second Circuit's departure from this established tradition conflicts with controlling authority of this Court.

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[7] *E.g.*, *Louisville & Nashville R. R.. Co. v. Garrett*, 231 U.S. 298, 303-04, 310 (1913); *Ohio Tax Cases*, 232 U.S. 576, 586-87 (1914); *Greene v. Louisville & Interurban R. R. Co.*, 244 U.S. 499, 508-09 (1917); *Cincinnati v. Vester*, 281 U.S. 439, 448-49 (1930). Many decisions have exercised jurisdiction under *Siler* and proceeded, as the District Court did in this case, to dispose of the case solely on the nonfederal ground. *See, e.g.*, *Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946); *Waggoner Estate v. Wichita County*, 273 U.S. 113, 116-19 (1927); *Chicago G. W. R. Co. v. Kendall*, 266 U.S. 94 (1924); *United Fuel Gas Co. v. Railroad Comm'n*, 278 U.S. 300, 308 (1929); *Risty v. Chicago, R.I. & P.R. Co.*, 270 U.S. 378, 387 (1926).

A. The Decision Below Conflicts With This Court's Decision In *Shaw v. Delta Airlines, Inc.*

There can be no doubt that federal jurisdiction attached to Fleet's statutory preemption claim. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983), this Court held it

> beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-162 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96, n.14. This Court has twice reaffirmed *Shaw*'s jurisdictional holding. *See, e.g., Morales v. TWA*, 504 U.S. 374, 381 (1992); *Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n.6 (1985).

Although the Second Circuit's reasoning is less than pellucid, the court seems to have adopted a grudging and mistaken understanding of *Shaw*. In the Second Circuit's view, *Shaw*'s holding that § 1331 clearly reaches suits seeking to enjoin state action as pre-empted by a federal statute is a limited exception to the well-pleaded complaint rule, a rule that would, absent *Shaw*'s "exception," bar jurisdiction. Unwilling to extend that "exception" to cases, like the instant one, in which there is also a dispute about whether the challenged action is authorized under state law, the Second Circuit held that subject matter jurisdiction is lacking.

This reasoning misunderstands both *Shaw* and the well-pleaded complaint rule. Indeed, *Shaw* does not so much as mention the well-pleaded complaint rule.[8] The Court of Appeals'

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[8] By contrast, virtually all of the opinion in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), issued the same day as *Shaw*, discusses the well-pleaded complaint rule and the doctrine of

misunderstanding about the well-pleaded complaint rule apparently rests on its assumption that a pre-emption claim is inherently defensive. (App. at A9-A10, A14-A15.) That

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Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), which prevents a declaratory judgment action from being used to expand the jurisdiction of the federal courts. The panel's opinion expends a great deal of effort trying to reconcile a perceived inconsistency between *Shaw* and *Franchise Tax Board*, (*see* App. at A9-A14), ultimately concluding that the difference is that in *Franchise Tax Board*, the plaintiff sought only declaratory relief, whereas in *Shaw* the plaintiff sought injunctive relief as well as a declaration of rights. (*Id.* at A14-A15).

The panel's labored analysis misses the mark. This Court has clearly stated that *Shaw*'s recognition of subject matter jurisdiction over statutory pre-emption claims extends to an action in which the federal plaintiff seeks only a declaratory judgment. *See Lawrence County v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256, 259 n. 6 (1985). Indeed, by the time of its unanimous ruling in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), that the federal plaintiffs were entitled to a declaratory judgment that federal law pre-empted a state regulatory regime, this court apparently viewed the jurisdictional issue as so clearly settled by decisions like *Lawrence County* and *Shaw* as to require no discussion. *See also Steffel v. Thompson*, 415 U.S. 452, 458 n. 6 (1974) (upholding federal court subject matter jurisdiction to issue a declaratory judgment as to whether application of a state statute was pre-empted by the First Amendment, even though the federal plaintiff had abandoned any claim to injunctive relief).

The distinction between *Shaw* and *Franchise Tax Board* rested not on any difference between declaratory and injunctive relief, but rather, as the *Shaw* opinion clearly explained, on the nature of the claim asserted by the plaintiff in each case. In *Shaw*, the private plaintiff asserted a federal right to be free of state interference from the allegedly pre-empted state regulatory action. In *Franchise Tax Board*, by contrast, the plaintiff was a state agency that asserted only that no federal law limited its authority:

> *Franchise Tax Board* was an action [by a state agency] seeking a declaration that state laws were **not** pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim **are** pre-empted by ERISA as well as declarations that those laws are pre-empted.

Shaw, 463 U.S. at 96 n.14 (emphasis in original).

assumption, however, is simply mistaken. To be sure, a claim of federal preemption is sometimes asserted as a defense to an enforcement action under the state law--and in such cases, there is no § 1331 jurisdiction under the well-pleaded complaint rule. But in cases like *Shaw*, and this case, a claim of federal pre-emption is the basis for an affirmative claim seeking injunctive or declaratory relief;[9] as this Court has noted, under *Ex parte Young*, 209 U.S. 123 (1908), federal laws can "serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). This Court has also noted the critical importance of federal jurisdiction over such affirmative federal claims, to spare plaintiffs like Fleet from the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [it] believes to be [federally] protected activity in order to avoid becoming enmeshed in a [state enforcement action]." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

Thus Fleet, like the plaintiffs in *Shaw*, is a company subject to federal regulation which asserts that a state regulation is pre-empted by federal law. And like the plaintiffs in *Shaw*, Fleet's allegation of a federal right to be free from pre-empted state regulation "presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." *Id.*

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[9] *See generally* R. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System*, at 912 (4th ed. 1996) ("[F]ederal defenses can frequently be recast as affirmative claims of federal right. For example, the jurisdictional statutes have often been read to open the doors of the federal courthouse to cases in which plaintiffs are seeking to enjoin state law as in violation of federal statutory or constitutional provisions. *See, e.g., Shaw v. Delta Airlines*, [463 U.S. 85 (1983)], and the line of cases flowing from *Ex parte Young*, 209 U.S. 123 (1908) . . . It is thus not the case that the existing law generally excludes from federal court all litigants whose contention is that state-law claims are rendered *pro tanto* invalid by federal law: if the relevant federal remedial law (express or implied) gives the claimant a federal cause of action, and the claimant reaches the federal courthouse first, federal jurisdiction is usually upheld . . .").

B. The Decision Below Conflicts with This Court's Decision in *City of Chicago v. International College of Surgeons*

While *Shaw* leaves no doubt that Fleet's preemption claim falls within the district court's federal question jurisdiction, this Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523 (1997), is equally clear that that jurisdiction does not dissolve because Fleet's complaint includes a closely-related state law claim. There, this Court held that once a federal question gave rise to jurisdiction under § 1331, a district court's supplemental jurisdiction under § 1367 embraced even a state law claim seeking deferential, on-the-record review of a state administrative proceeding. Indeed, the Second Circuit's approach is directly at odds with *College of Surgeons*, a decision not cited below. For the Second Circuit held that while the District Court would have, or at least might have, jurisdiction over an action by Fleet asserting only a federal claim, there was no subject matter jurisdiction over the actual complaint, because it also alleged a supplemental state law claim. The language of this Court in *College of Surgeons* could hardly illuminate the error below more clearly:

> Nothing in the jurisdictional statutes suggests that the presence of related state law claims somehow alters the fact that [the] complaints, by virtue of their federal claims, were 'civil actions' within the federal courts' 'original jurisdiction.'

Id., 118 S. Ct. at 530 (citation omitted).[10]

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[10] *Cf., United Air Lines, Inc. v. Division of Indus. Safety*, 454 U.S. 944 (1981) (White, J., dissenting from the denial of *certiorari*) ("That the complaint in this case, in addition to claiming federal pre-emption, may also have claimed that the state law should not be construed to reach [the plaintiff's conduct] does not defeat federal jurisdiction based on the pre-emption claim.")

II. The Decision Below Conflicts with Decisions of Many Other Federal Courts of Appeals and the Common Understanding of Numerous Lower Courts and Litigants

The Second Circuit contended that a case like this one, involving claims that official action is both pre-empted under a federal statute and unauthorized under state law, "presents an issue of federal subject matter jurisdiction that appears not to have been explicitly considered by any court." (App. at A2.) That contention is simply wrong.[11] As discussed below, in decisions not cited by the Second Circuit, nine other Courts of Appeals have exercised jurisdiction in these same circumstances.

Two of these decisions are particularly noteworthy in that they take exactly the approach the District Court followed (and of which the Second Circuit disapproved) in this case--exercising jurisdiction over both a federal statutory claim and a pendent state law claim, and then awarding relief to the plaintiffs exclusively under the pendent state law claim. For example, in *Air Cal, Inc. v. City & County of San Francisco*, 865 F.2d 1112 (9th Cir. 1989), several airlines brought suit challenging a San Francisco ordinance requiring most airport contractors and lessees to pay prevailing wages to their employees. Plaintiffs alleged that the ordinance "(1) was invalid under the San Francisco City Charter; (2) violated the lease and use agreements [between the airlines and the San

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[11] Indeed, the Second Circuit virtually, if indirectly, conceded that its statement is wrong. The Court below discussed decisions in other circuits holding that *Pullman* abstention, in order to resolve an uncertain question of state law, is not appropriate in suits based on a claim of federal statutory pre-emption. (App. at A17.) But those courts could not have reached a question of *Pullman* abstention unless and until they had ascertained that they had subject matter jurisdiction. The Court did contend that "in *nearly* all of the cases rejecting abstention in preemption cases, the state law was clear," (*id.*), and proceeded to cite several court of appeals decisions in which state law was settled. *Id.* But the word "nearly" highlights the existence of other decisions in which state law was unsettled but in which federal courts nonetheless recognized their subject matter jurisdiction over claims that state law was pre-empted.

Francisco Airports Commission]; (3) was preempted by state law; and (4) was preempted by various federal statutes and regulations." *Id.* at 1114. The Ninth Circuit concluded that there was "federal question jurisdiction over the federal constitutional and federal statutory preemption claims raised by the Airlines under 28 U.S.C. § 1331 (1982), and . . . pendent jurisdiction over the related California law claims." *Id.* It proceeded to affirm the district court's decision on the merits, which rested entirely on the ground that under state law defendants lacked authority to enact the challenged ordinance--with no suggestion that that lack of authority somehow destroyed federal subject matter jurisdiction that would otherwise exist. *Id.* Other Ninth Circuit decisions are in accord.[12]

Similarly, in *Springfield Television, Inc. v. City of Springfield*, 428 F.2d 1375 (8th Cir. 1970), *appeal after remand*, 462 F.2d 21 (8th Cir. 1972), plaintiffs challenged an ordinance concerning a community antenna for cable television, alleging that it (1) was pre-empted by the Federal Communications Act of 1934 and FCC regulations, (2) ran afoul of the Commerce Clause and First Amendment of the United States Constitution, and (3) violated the Missouri Constitution and statutes and exceeded the city's authority under its charter. After the district court dismissed for lack of subject matter jurisdiction, the Eighth Circuit reversed and remanded, ruling (1) that plaintiffs' pre-emption claim[13] arose under an act of Congress regulating interstate commerce, 28 U.S.C.

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[12] *See also Inland Empire Chapter of Associated Gen. Contractors of Am. v. Dear*, 77 F.3d 296 (9th Cir. 1996) (remanding for reconsideration of dismissal of supplemental state law claims in combined ERISA preemption and state law challenge to prevailing wage laws). In *Hotel Employees & Restaurant Employees Int'l Union v. Nevada Gaming Comm'n*, 984 F.2d 1507 (9th Cir. 1993), the Ninth Circuit addressed another combined preemption and state law challenge. In that case, the court rejected the federal preemption claim on its merits and did not reach the state law issue.

[13] The court did not consider the effect of plaintiffs' constitutional claims on the issue of federal jurisdiction.

§ 1337,[14] *see Springfield*, 428 F.2d at 1379-81, and (2) that plaintiffs' state law claims fell within the district court's pendent jurisdiction, *id.* at 1381. On remand, the plaintiffs stipulated they would pursue only their claims that the ordinance violated the federal Constitution and was unauthorized under the City Charter. The district court dismissed again, this time concluding that the plaintiffs lacked standing to pursue these claims. And again, the Eighth Circuit reversed, finding that plaintiffs had standing to assert their statutory pre-emption claim--even though they had stipulated that they would set it aside--and that this jurisdictional predicate permitted the district court to hear the pendent state claim. *Springfield*, 462 F.2d at 23-24. On the merits, the court of appeals proceeded to decide the state law claim, much as the District Court did here. Thus, although in the end the only basis for federal jurisdiction was a statutory pre-emption claim--and, indeed, one that the plaintiffs had agreed not to pursue--the Eighth Circuit had no doubt that subject matter jurisdiction was present.

Like the Ninth and Eighth Circuits, the Courts of Appeals for the First, Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all exercised jurisdiction over cases in which federal question jurisdiction was based all or in part on a claim of federal statutory pre-emption but in which the plaintiff also alleged a supplemental state law challenge to official action. *See International Paper Co. v. Town of Jay*, 928 F.2d 480 (1st Cir. 1991) (upholding a pollution ordinance against claims that the law was pre-empted by the NLRA, violated plaintiff's rights to due process and equal protection, and was void or voidable under Maine's conflict of interest statute); *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43 (1st Cir. 1984) (Breyer, J.) (rejecting federal preemption claim under the Hazardous Materials Transportation Act as well as federal constitutional claims, and remanding for consideration whether district court should retain jurisdiction over claims that the challenged action violated the

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[14] The standards for determining whether a claim arises under federal law are identical under §§ 1331 and 1337. See *Franchise Tax Bd.*, 463 U.S. at 8, n.7.

state constitution); *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986), *on remand*, *United Servs. Auto. Ass'n v. Foster*, 680 F. Supp. 712 (M.D. Pa. 1987), *aff'd in part and rev'd in part sub nom., Ford Motor Co. v. Insurance Comm'r of Pa.*, 874 F.2d 926 (3d. Cir. 1989) (initially reversing the district court's decision to abstain from deciding claim that action of state insurance commissioner was pre-empted by federal banking laws, despite an acknowledged genuine question whether commissioner's action was authorized by state law; after a remand, ruling that neither the federal banking laws nor the dormant Commerce Clause pre-empted the Commissioner's action, and remanding for adjudication of claim that the action was not authorized by state law); *Missouri Pac. R. Co. v. Railroad Comm'n of Texas*, 948 F.2d 179 (5th Cir. 1991) (affirming judgment for plaintiff based on federal pre-emption under the Federal Railway Safety Act, and then dismissing, as moot, plaintiff's state law challenge); *Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996) (reversing injunction based on federal pre-emption claim under Federal Aviation Act, affirming dismissal of federal constitutional claims, and rejecting plaintiff's claims under state law); *DeHart v. Town of Austin*, 39 F.3d 718 (7th Cir. 1994) (rejecting on the merits claim of federal pre-emption under the Animal Welfare Act and state pre-emption challenges to local ordinance and dismissing federal constitutional challenges as premature); *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631 (7th Cir. 1996) (affirming district court's discretionary dismissal of supplemental state claims and rejecting on the merits the claim that state agency's actions were pre-empted by the NLRA and ERISA and violated the Constitution); *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480 (10th Cir. 1998) (rejecting on merits claims that local ordinance exceeded city's authority under state law and was pre-empted by certain federal land grant statutes); *Blue Circle Cement, Inc. v. Board of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994) (finding hazardous waste zoning ordinance pre-empted by Resource Conservation and Recovery Act and invalid under dormant Commerce Clause, but affirming holding that ordinance does not violate state law); *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988) (holding that federal housing statutes

and regulations and state law pre-empted city ordinance regarding safety requirements for mobile homes).

In none of the cases cited above did the courts view the existence of federal question jurisdiction over the federal law claim as dependent on how settled or unsettled was the related claim that the official action also violated state law. Thus, the decision below thus creates a serious conflict with decisions in other circuits. And this conflict of authority does not concern a trifling matter. Rather, it implicates fundamental questions of the scope of federal court authority in suits challenging the legality of, and seeking federal court injunctions against, state and local governmental action. Those questions, moreover, reach far beyond the enforcement in federal court of federal banking laws, for the Second Circuit's decision, if not reversed, would curtail federal jurisdiction over an enormous range of federal statutory matters. In addition to the wide variety of subjects addressed by the circuit court cases cited above, an even broader array of important federal regulatory schemes have been at issue in the numerous district court decisions that, like those circuit decisions, have routinely considered combined pre-emption and state law challenges to official action.[15]

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[15] Among the many district court decisions in which plaintiffs combined pre-emption and state law claims are those concerning the following subjects: **antitrust**, *Giddens v. City of Shreveport*, 901 F. Supp. 1170 (W.D. La. 1995); **aviation**, *Brumfield Towing Serv., Inc. v. City of Baton Rouge*, 911 F. Supp. 212, 216 (M.D. La. 1996); *Blue Sky Entertainment, Inc. v. Gardiner*, 711 F. Supp. 678, 684-85 (N.D.N.Y. 1989); *Rocky Mountain Airways, Inc. v. County of Pitkin*, 674 F. Supp. 312, 320 (D. Colo. 1987); **banking**, *Wisconsin League of Financial Insts., Ltd. v. Sherry*, 761 F. Supp. 636, 639 (W.D. Wis. 1991); **cable television**, *Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1529-30 (M.D. Ala. 1992); *Cox Cable New Orleans, Inc. v. City of New Orleans*, 594 F. Supp. 1452, 1457-59 (E.D. La. 1984); *Satellite Television of N.Y. Associates v. Finneran*, 579 F. Supp. 1546 (S.D.N.Y. 1984); **employee benefits**, *Corporate Health Ins. Inc. v. Texas Dep't of Ins.*, 12 F. Supp. 2d 597 (S.D. Tex. 1998); *Air Transp. Ass'n of Am. v. City and Co. of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998); *Minnesota Chamber of Com. & Indus. v. Hatch*, 672 F. Supp. 393, 396 (D. Minn. 1987); **energy**, *Panhandle Eastern Pipe Line Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1307 (S.D. Ind. 1995); **environmental**

The conflict of the Second Circuit's decision with this large group of circuit (and district) court decisions thus concerns a profound question of wide-ranging significance, calling upon this Court for resolution.

III. The Court of Appeals' Decision Conflicts with Congressional Grants of Jurisdiction and Invades Legislative Authority

In creating its novel theory of disappearing jurisdiction, the Second Circuit not only disregarded this Court's precedents and ignored decisions in other circuits. Equally fundamentally, it failed to respect the primacy of Congress in defining the scope of lower federal court jurisdiction.

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protection, *Detroit Edison Co. v. Michigan Dep't of Envtl. Quality*, 29 F. Supp. 2d 786, 789-90 (E.D. Mich. 1998); *Ogden Envtl. Servs. v. San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988); *SED, Inc. v. Dayton*, 515 F. Supp. 737, 740-41 (S.D. Ohio 1981); **housing**, *Colorado Manufactured Hous. Ass'n v. Board of County Comm'rs.*, 946 F. Supp. 1539 (D. Colo. 1996); *Bollack v. City of Mitchell*, 935 F. Supp. 1042 (D. S.D. 1996); *Help Hoboken Housing v. City of Hoboken*, 650 F. Supp. 793, 797 (D.N.J. 1986); **immigration**, *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997); **product liability**, *National Warranty Ins. Co. v. Greenfield*, 24 F. Supp. 2d 1096 (D. Or. 1998); **securities**, *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985); **telecommunications**, *Bellsouth Telecommuns., Inc. v. City of Coral Springs*, No. 97-7010, 1999 U.S. Dist. LEXIS 1808 (S.D. Fla. Jan. 15, 1999); *AT&T Communs. v. City of Dallas*, 8 F. Supp.2d 582 (N.D. Tex. 1998); *AT&T Communs. v. City of Austin*, 975 F. Supp. 928, 936 (W.D. Tex. 1997); **tobacco products and advertising**, *Philip Morris Inc. v Harshbarger*, 946 F. Supp. 1067, 1070-73 (D. Mass. 1996); *Federation of Adver. Indus. Representatives, Inc. v. Chicago*, 12 F. Supp. 2d 844 (N.D. Ill. 1998); and **transportation**, *Illinois Central R. Co. v. Fordice*, 30 F. Supp. 2d 945 (S.D. Miss. 1997), *aff'd mem.*, 165 F.3d 23 (5th Cir. 1998); *Consolidated Rail Corp. v. Bayonne*, 724 F. Supp. 320 (D.N.J. 1989); *Mason and Dixon Lines, Inc. v. Eagerton*, 555 F. Supp. 434, 436-39 (M.D. Ala. 1982).

A. The Court of Appeals' Decision Conflicts With The Plain Language Of 28 U.S.C. § 1331

Under 28 U.S.C. § 1331, federal question jurisdiction includes "all civil actions arising under the Constitution, laws, or treaties of the United States." The Second Circuit conceded that a federal court "unquestionably has jurisdiction" over a claim that state official action is pre-empted by the federal Constitution, *"notwithstanding [any] doubt concerning the meaning of state law, and the federal court sometimes construes the state law."* (App. at A16; emphasis added.) However, the Second Circuit asserted that for a complaint alleging that state official action is pre-empted by a federal *statute* the inclusion of a related challenge raising a disputed question of state law does cause federal question jurisdiction to evaporate.

One can agree in a general way with the Court of Appeals that "preemption claims, though implicating the Supremacy Clause, . . . [present] a constitutional issue of a lesser magnitude than suits challenging the authority of state officials . . . [as violative of] the substantive limitations of the Constitution." (App. at A16). However, the question is not whether a judge can perceive some distinction in magnitude, but rather whether Congress, in enacting § 1331, drew that distinction. The answer is clear: the statute gives "the Constitution, laws, or treaties of the United States" equal jurisdictional significance; a court applying § 1331 must do the same, whether or not it thinks Congress should have been more discerning. To our knowledge, no other court has ever suggested such a distinction between federal constitutional claims (jurisdiction over which does not evaporate because of a supplemental state law claim) and federal statutory claims (jurisdiction over which does evaporate because of such a claim). *See United Mine Workers v. Gibbs*, 383 U.S. at 725, 726, 729 (1966) (stressing that the exercise of pendent jurisdiction is particularly appropriate with respect to issues of state law that implicate federal statutory preemption).

B. The Court of Appeals' Decision Conflicts With 28 U.S.C. § 1367

The Second Circuit's holding that subject matter jurisdiction over a federal claim evaporates when the complaint also challenges official action as unauthorized under state law cannot be reconciled with § 1367. That statute provides, clearly and simply, that when a federal question case has been properly brought to the federal court, the court has subject matter jurisdiction over all claims "that form part of the same case or controversy," including claims that do not independently provide federal jurisdiction. Having acknowledged, albeit grudgingly, that under *Shaw* there is § 1331 jurisdiction over a suit seeking to enjoin the Commissioner's threatened action on the ground that it is pre-empted by federal banking laws, the Second Circuit could not have reached its conclusion that there was no subject matter jurisdiction over Fleet's actual complaint--which included the supplemental state law claim--without overriding § 1367.[16]

The Second Circuit's decision contravenes not only the text but also the policy underlying § 1367. For that decision requires Fleet, in order to obtain a federal court decision on its federal question claim, either to (1) drop its state law claim altogether, (2) pursue the state law claim in a state forum and then return to federal court only after the state forum has ruled, or (3) relinquish its right to a federal forum in order to be able to bring both its federal and state law claims in a single proceeding. It was precisely to avoid those burdens that Congress codified in § 1367 the principles of pendent and ancillary jurisdiction, as the House Report on the bill of which § 1367 was a part makes clear. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 1990 ("Supplemental

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[16] When Congress has wanted to narrow the scope of supplemental jurisdiction, it has done so expressly, both within the supplemental jurisdiction statute, *see* 28 U.S.C. § 1376(b) (limiting scope of supplemental jurisdiction in diversity actions under § 1332), and in other enactments, *see, e.g.*, 42 U.S.C. § 13981(e)(4) (stating that § 1367 shall not be construed to confer jurisdiction over certain domestic relations matters).

jurisdiction has enabled federal courts and litigants to take advantage of the federal procedural rules on claim and party joinder to deal economically-in single rather than multiple litigation-with related matters, usually those arising from the same transaction, occurrence, or series of transactions or occurrences. Moreover, the district courts' exercise of supplemental jurisdiction, by making federal court a practical arena for the resolution of an entire controversy, has effectuated Congress's intent in the jurisdictional statutes to provide plaintiffs with a federal forum for litigating claims within original federal jurisdiction.")

In seeking to justify its approach, the Second Circuit asserted, albeit without any support, that the instant lawsuit "is primarily an attempt to have a federal court construe a state regulatory statute", (App. at A3),[17] and warned that allowing Fleet to maintain its claim would open the federal courthouse to an onslaught of suits that would undermine the authority of state courts. (App. at A20.)[18] However, the jurisdictional statutes enacted by Congress, as interpreted by this Court, have dealt with the problem that the court fears, and the court's approach conflicts with the existing legislative approach.

Under *Bell v. Hood*, 327 U.S. 678, 682 (1946), a district court can dismiss a claim that is "insubstantial and frivolous" for want of jurisdiction, in which case any supplemental state claim also falls away. In this case, the court of appeals did not find that

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[17] The panel's contention that Fleet "enter[ed] the District Court to obtain an interpretation that the relevant state law . . . does not, as a matter of state law, prevent its imposition of the surcharge fee" (App. at A15) (emphasis is in original), has no basis in the record. Fleet came to federal court so that it could obtain protection from punitive enforcement action by the Commissioner if it exercised its authority under federal law as construed by the Office of the Comptroller of the Currency, Fleet's federal regulator. The District Court addressed Fleet's state law claim first because the parties to the suit and the District Court agreed that doing so was appropriate as a matter of orderly administration of the litigation.

[18] "In almost every area in which state law regulates private conduct, some federal statute can arguably be invoked by the private party to provide the basis for a preemption claim." (App. at A21.)

Fleet's claim under the national banking laws was insubstantial or frivolous. Absent such a finding, the federal courts are obliged to reach the merits of the federal claim, *id.* at 682-83, and to exercise supplemental jurisdiction consistently with § 1367.

The court below feared, however, that a plaintiff might present a "colorable" federal preemption claim that would establish federal jurisdiction under *Bell v. Hood*, in an effort to improperly bring a supplemental state law claim into federal court. In some cases, there may be reason for concern that a plaintiff will invoke supplemental jurisdiction to get a federal tail to wag a state dog. But Congress has addressed that concern in § 1367 by giving the District Courts adequate tools to avoid improvidently deciding supplemental state law claims. Thus, a District Court may decline to exercise jurisdiction over a supplemental claim that "raises a novel or complex issue of State law," § 1367(c)(1); that "substantially predominates over the claim or claims over which the district court has original jurisdiction," § 1367(c)(2); or when "the district court has dismissed all claims over which it has original jurisdiction," § 1367(c)(3). But the Second Circuit did not find that any of these criteria applied. Indeed, none of them do: the District Court found the state law issue to be clear-cut rather than novel or complex (*compare* (App. at A57) *with* § 1367(c)(1)); the actions of the Comptroller of the Currency in filing an *amicus* brief supporting Fleet's petition for rehearing, and in intervening as a plaintiff in the federal lawsuit Fleet filed after the instant one was dismissed, surely suggest that the federal claims are hardly minor ones over which state law predominates (*see* § 1367(c)(2)); and the federal claims were never dismissed on the merits (§ 1367(c)(3)). More fundamentally, § 1367(c) addresses possible abuse of supplemental jurisdiction by authorizing, in various circumstances, dismissal of the *supplemental state law claim.* Nothing in § 1367 authorizes a court to do what the Second Circuit did--to dismiss, for want of subject matter jurisdiction, *a non-frivolous federal law claim.*

C. The Court of Appeals Improperly Based Its Denial Of Subject Matter Jurisdiction On Prudential Considerations

It is an "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of New Orleans* (*"NOPSI"*), 491 U.S. 350, 359 (1989). In the decision below, however, the Second Circuit arrogated to itself the power to determine whether the jurisdiction plainly conferred by Congress in §§ 1331 and 1367 should reach Fleet's Complaint. (*See* App. at A18.) The court of appeals had no right to second guess what Congress has done.

In justifying its extra-statutory refusal to entertain Fleet's claim, the Second Circuit declared: "That is an ill-advised use of federal question jurisdiction." (App. at A21.) Simply put, the Second Circuit had no right to refuse to hear the case based on the judges' view about the wisdom of congressional jurisdictional policy. As this Court stressed in *NOPSI*,

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. For example: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 6 Wheat. 264, 404 [, 5 L.Ed. 257] (1821).

491 U.S. at 357; *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress").

Under the Constitution, Congress and not the Second Circuit prescribes the original jurisdiction of the lower courts. In claiming a power not to recognize subject matter jurisdiction in cases where it thought Congress' allocation of jurisdiction to be "ill-advised", the Court of Appeals has sharply departed from accepted practice, warranting "an exercise of this Court's

supervisory power." *See* Sup. Ct. Rule 10(a); Robert L. Stern, et al., *Supreme Court Practice* 191-192 (7th ed. 1993) ("On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility.").

To be sure, as this Court has noted, a court with subject matter jurisdiction may, in "'exceptional circumstances,'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)), exercise "discretion in determining whether to grant certain types of relief." *See Quackenbush*, 517 U.S. at 718 (quoting *NOPSI*, 491 U.S. at 359). As this Court has also noted, however, abstention doctrines differ in kind from considerations of jurisdiction.

> Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. Abstention may serve only to postpone rather than to abdicate jurisdiction . . . .

Allen v. McCurry, 449 U.S. 90, 101 n. 17 (1980) (citation omitted); *accord Growe v. Emison*, 507 U.S. 25, 32 n.1 (1993) ("It would be preferable to speak of Pullman 'deferral' rather than Pullman abstention."). However, instead of determining whether deferral was appropriate by reviewing the District Court's decision not to abstain, the court below improperly smuggled the concerns of prudence and discretion that inform abstention doctrines into its analysis of the scope of subject matter jurisdiction under § 1331.

Moreover, when abstention is genuinely in issue, "[t]he proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts." *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973) (per curiam). That retention of jurisdiction permits the court to provide interlocutory relief based on federal law, *see Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 312 n.18 (1979); *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959), or to re-activate

the case should state court proceedings get bogged down. *See Employers Ass'n, Inc. v. United Steelworkers*, 19 F.3d 405 (8th Cir.), *vacated on other grounds*, 23 F.3d 214 (8th Cir. 1994). The importance of these protections is illustrated by the facts of this case--where Fleet was "faced with a Hobson's choice: continually violate the [Connecticut] law and expose [itself] to potentially huge liability; or violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. TWA*, 504 U.S. 374, 381 (1992). Retaining jurisdiction leaves a federal court with the authority, when necessary, to take action to prevent the federal plaintiff from suffering undue harm *pendente lite*. By contrast, the Second Circuit's surrender of subject matter jurisdiction fails to honor this Court's teaching that abstention typically constitutes a deferral rather than a relinquishment of jurisdiction, and would preclude federal courts in cases in which abstention is appropriate, from protecting the federal plaintiff against interim harm. In sum, the prudential concerns that the Second Circuit invoked simply do not justify the categorical limitation on jurisdiction that the Court created.

D. The Court Of Appeals' Decision Cannot Be Squared with the Scope of Statutory Protection of Federal Rights Provided under 42 U.S.C. § 1983

The Second Circuit's reasoning echoes an approach discussed and repudiated by this Court in *Monroe v. Pape*, 365 U.S. 167 (1961). In that case, the Court considered the contention that a state or local official could not be sued in federal court under 42 U.S.C. § 1983 absent a showing that the official's action was authorized by state law. If the action were unauthorized, the argument went, plaintiff should instead seek redress in the state courts. *See id.* at 172 (describing the argument). The Court decisively rejected that view, upholding federal intervention whether or not the official's action was authorized. *Id.* at 183 ("The federal remedy is supplementary to the state remedy, and the

latter need not be first sought and refused before the federal one is invoked.") Subsequent cases have recognized that § 1983 extends to claims that action under color of state law violates federal statutory as well as federal constitutional rights. *See, e.g., Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *Maine v. Thiboutot*, 448 U.S. 1 (1980).[19]

The panel's result conflicts with this understanding of federal protection against state official action. In cases in which a plaintiff asserts only that a state official action violates a federal statutory right, the court below would apparently recognize subject matter jurisdiction. But if the plaintiff adds a claim, as Fleet did here, that the challenged action was also unauthorized under state

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[19] Although Fleet's Complaint did not explicitly refer to § 1983, it alleges all of the elements of a § 1983 claim. In *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), the Court held that a suit to enjoin an official from enforcing state law, on the ground that it was preempted by a federal statute, states a good claim to relief under § 1983 where the federal statute creates in the plaintiff a sufficiently specific right to permit judicial enforcement. As the discussion at the beginning of this Petition makes clear, the National Banking Act, no less than the statute in *Golden State*, confers with adequate specificity "a guarantee of freedom for private conduct that the State may not abridge." *Id.* at 112; *see also Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994) (exceptional cases aside, "§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law"). Given the injunction in Fed. R. Civ. Proc. 8(f) that "[a]ll pleadings shall be so construed as to do substantial justice," the Complaint must be read as embracing a § 1983 claim for relief. *See generally*, 5, 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1286, 1363 (2d ed. 1990).

In any event, Fleet was not required to plead a § 1983 claim in order to maintain its pre-emption action, for this Court has recognized that the national banking laws directly support a cause of action for preemption. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996) (upholding pre-emption claim pled directly under federal banking law). But whether Fleet's pre-emption claim is viewed as an action under the National Bank Act or under § 1983, the Second Circuit's decision conflicts with the approach of *Monroe v. Pape* to the exercise of federal authority when official action of state or local officials is challenged in federal court.

law, then jurisdiction evaporates--just the approach to federal protection of federal rights that the Court rejected in *Monroe v. Pape*. Thus, the Second Circuit's decision, much as it disregarded the statutory framework for subject matter jurisdiction set forth in 28 U.S.C. §§ 1331 and 1367, similarly cannot be squared with the statutory framework for federal protection of federal rights established by Congress in 42 U.S.C. § 1983.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* to the United State Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE,
BANKING COMMISSIONER OF THE STATE OF
CONNECTICUT AND CONNECTICUT DEPARTMENT
OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: October 23, 1998 Decided: Nov. 9, 1998)
Docket No. 98-9324

FLEET BANK, NATIONAL ASSOCIATION,
Plaintiff-Appellee,

- v. -

THE HONORABLE JOHN P. BURKE, Banking Commissioner of the State of Connecticut, and CONNECTICUT DEPARTMENT OF BANKING, a State Agency,
Defendants-Appellants.

Before:
NEWMAN and JACOBS, Circuit Judges,
and BURNS,* District Judge

Appeal from the October 5, 1998, judgment of the United States District Court for the District of Connecticut (Janet Bond Arterton, Judge), construing Conn. Gen. Stat. 36a-156 not to prevent plaintiff-appellee from imposing a surcharge fee on non-customer users of its ATMs.

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* Honorable Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

Judgment vacated and case remanded with directions to dismiss for lack of subject matter jurisdiction.

RICHARD BLUMENTHAL, Atty. Gen., Hartford, Conn. (William J. Prensky, Asst. Atty. Gen., Hartford, Conn., on the brief), for defendants-appellants.

DANIEL L. FITZMAURICE, Hartford, Conn. (Allan B. Taylor, Day, Berry & Howard, Hartford, Conn., on the brief), for plaintiff-appellee.

(Michael E. Malamut, Loretta M. Smith, Boston, Mass., submitted a brief for amicus curiae The New England Legal Foundation).

(Raymond Natter, Robert B. Serino, L. Robert Griffin, Rosa M. Koppel, F. Thomas Eck, IV, Washington, D.C., submitted a brief for amicus curiae The Office of the Comptroller of the Currency).

(Donald E. Frechette, Edwards & Angell, Hartford, Conn., submitted a brief for amicus curiae First Union National Bank).

JON O. NEWMAN, Circuit Judge:

This appeal concerning a preemption claim presents an issue of federal subject matter jurisdiction that appears not to have been explicitly considered by any court. The issue is whether subject matter jurisdiction under 28 U.S.C. § 1331 (1994) is available for a complaint seeking declaratory and injunctive relief against a state officer and a state agency that alleges (a) that state law does not prohibit the action the defendants assert the plaintiff may not take

and (b) that state law, if construed to prohibit the plaintiff's conduct, is preempted by federal law. The issue arises on an appeal by the Connecticut Commissioner of Banking ("Commissioner") and the Connecticut Department of Banking from the October 5, 1998, judgment of the District Court for the District of Connecticut (Janet Bond Arterton, Judge) granting a declaratory judgment in favor of the plaintiff Fleet Bank, National Association ("Fleet"). The judgment declares that Connecticut's banking laws do not prohibit Fleet from imposing a fee upon non-Fleet customers for using a Fleet automated teller machine ("ATM"). We conclude that federal question jurisdiction is lacking because the lawsuit is primarily an attempt to have a federal court construe a state regulatory statute. We therefore vacate the judgment and remand with directions to dismiss the complaint.

BACKGROUND

Fleet is a national banking association organized under the National Bank Act, 12 U.S.C. §§ 21-216d (1994 & West Supp. 1998) ("the Act"). The Act confers upon a national banking association the power, among other things, "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." Id. § 24 (Seventh). In September 1995, Fleet sought an opinion from the Commissioner that the Connecticut statutes governing the use of ATMs in Connecticut do not place any restriction on the ability of a federally chartered bank to impose a fee ("the surcharge fee") for use of the bank's ATMs by a person who does not otherwise have a banking relationship with the bank. The Commissioner replied that Connecticut banking laws do not authorize a surcharge fee. He reasoned that the state statute, Conn. Gen. Stat. § 36a-156, authorizing banks

to impose a usage fee (also called an "interchange fee") on other banks whose customers use the ATMs of so-called "host" banks (Fleet in this litigation) "carries with it an implied prohibition against the bank imposing a fee on customers of the other bank for such use." Letter from John P. Burke, Banking Commissioner, to Robert M. Taylor, III, Esq. (Sept. 14, 1995).

Fleet then brought the pending lawsuit in the District Court. Its complaint set forth two propositions of law. First, Fleet alleged that the defendants "have adopted an arbitrary, capricious, and erroneous view of the Connecticut ATM statutes insofar as they conclude that these statutes prohibit Fleet from charging fees to non-depositor customers using its ATMs." Complaint ¶ 18. Second, Fleet alleged that "the Connecticut ATM statutes are preempted by 12 U.S.C. § 24 (Seventh) to the extent that these statutes are interpreted to prohibit Fleet from, or penalize Fleet for, exercising the power to charge fees to non-depositor customers using its ATMs." Id. ¶ 19. As relief, Fleet sought a judgment declaring that the Connecticut ATM statutes did not prohibit the surcharge fee, declaring that the National Bank Act preempts Connecticut ATM statutes insofar as they are interpreted to prohibit the surcharge fee, and enjoining the defendants from interfering with Fleet's imposition of the surcharge fee.

The defendants moved to dismiss on the ground that the case was appropriate for abstention under Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). The defendants pointed out that the state statute invoked by the Commissioner to support his view that the surcharge fee was prohibited had never been construed by any court, and urged that the initial construction should be made by a state court.

Judge Arterton denied the motion. She reasoned that abstention is "not appropriately invoked in a preemption case," citing Coker v. Pan American World Airways, Inc. (In re Pan American Corp.), 950 F.2d 839 (2d Cir. 1991), that the defendants had not made a sufficient showing that state law was unclear, and that interpretation of the Connecticut ATM statutes by a Connecticut court "will not resolve the preemption question in this case." Ruling on Defendants' Motion to Dismiss at 5, 8.

Thereafter, the parties agreed to, and the District Court approved, a bifurcation of issues. The Court's subsequent scheduling order set a date for simultaneous cross-motions for summary judgment on the state law issue, and bifurcated the preemption issue for later scheduling "if necessary." See Scheduling Order (Aug. 29, 1997). Upon the parties' cross-motions directed only to the state law issue, Judge Arterton ruled that Conn. Gen. Stat. § 36a-156 did not prohibit Fleet from imposing a surcharge on non-depositor customers for use of its ATMs. This Court stayed the District Court's judgment, in effect enjoining Fleet from imposing the surcharge fee, pending oral argument on the defendants' appeal, which we expedited. After oral argument, we terminated our stay, thereby permitting Fleet to impose the surcharge fee.

DISCUSSION

On appeal, the defendants challenge the District Court's subject matter jurisdiction. Though they failed to

mount such a challenge in the District Court,[1] that omission is not fatal, since subject matter jurisdiction may be raised at any time, and we would be obliged to consider it, even if the defendants had not raised it. See Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2052 (1998). Explication of the defendants' contention and the plaintiff's response will assist an understanding of the ground on which our disposition ultimately rests.

The defendants contend that subject matter jurisdiction is lacking because of the strictures of the well-pleaded complaint rule. As the defendants correctly note, that rule requires a complaint invoking federal question jurisdiction to assert the federal question as part of the plaintiff's claim, see Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 63 (1987); Gully v. First National Bank, 299 U.S. 109, 116 (1936), and precludes invoking federal question jurisdiction merely to anticipate a federal defense, see Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908), including the defense of preemption, see Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); Franchise Tax Board, 463 U.S. at 14; Travelers Indemnity Co. v. Sarkisian, 794 F.2d 754, 758 (2d Cir. 1986).

As the defendants further note, also correctly, the declaratory judgment statute does not confer jurisdiction on a district court, see Skelly Oil Co. v. Phillips Petroleum Co.,

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[1] The defendants' answer asserted lack of subject matter jurisdiction as a special defense, but linked this contention to a request that the District Court abstain from interpreting section 36a-156. The defendants' subsequent motion to dismiss asserted only the ground of abstention.

339 U.S. 667, 671 (1950), and a declaratory judgment plaintiff is subject to the rule that federal jurisdiction cannot be obtained by anticipating an adversary's federal defense, id. Moreover, and especially pertinent to the pending suit, a complaint seeking a declaratory judgment is to be tested, for purposes of the well-pleaded complaint rule, as if the party whose adverse action the declaratory judgment plaintiff apprehends had initiated a lawsuit against the declaratory judgment plaintiff. See Public Service Commission v. Wycoff Co., 344 U.S. 237, 248 (1952) ("Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court."); 15 James Wm. Moore, Moore's Federal Practice § 103.44[1], at 103-67 (3d ed. 1998) ("[T]he nature of the potential coercive action that the defendant might bring against the declaratory judgment plaintiff must be analyzed. The court will ask whether in this hypothetical suit, a federal question would be presented.") (footnote omitted).

Thus, the argument continues, Fleet's lawsuit seeking the declaratory relief of insulation from the Commissioner's threat to invoke section 36a-156 to prohibit Fleet's imposition of the surcharge should be viewed as if the Commissioner were suing Fleet; in that event, Fleet would be asserting not only its state law defense that section 36a-156 does not prohibit the surcharge fee but also, if the state law defense failed, its federal law defense of preemption. But under the well-pleaded complaint rule, the argument continues, the defensive nature of this preemption contention would not suffice to invoke federal subject matter jurisdiction, at least in the absence of a preemption claim

based on a federal law that "so completely pre-empt[s] a particular area that any civil complaint ... is necessarily federal in character." Metropolitan Life, 481 U.S. at 63-64.

This "complete preemption" exception to the well-pleaded complaint rule (or what the Moore treatise prefers to call "jurisdictional preemption," 15 Moore's Federal Practice §103.45[1], at 103-78), permitting a plaintiff to invoke federal subject matter jurisdiction to obtain a declaratory judgment that a state law requirement or prohibition is preempted, notwithstanding the defensive nature of the preemption contention, has thus far been recognized only in three contexts. These are cases asserting preemption by virtue of (1) the Labor Management Relations Act, 29 U.S.C. §§141-87, see Avco Corp. v. International Association of Machinists, 390 U.S. 557 (1968), (2) the civil enforcement provision of the Employees Retirement Income Security Act ("ERISA"), ERISA §502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), see Metropolitan Life, 481 U.S. at 65-67, and (3) some laws covering Indian tribal claims, see Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-70 (1974); see also 13 Charles Alan Wright, et al., Federal Practice & Procedure §3522 (2d ed. Supp. 1998) ("complete preemption" doctrine applied narrowly). However, the National Bank Act, whatever its preemptive effect, does not accomplish "complete preemption," see, e.g., Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754, 758-59 (10th Cir. 1989) (state law authority governs contracts of national banks unless it "expressly conflicts" with federal banking laws) (quoting Davis v.

Elmira Savings Bank, 161 U.S. 275, 283 (1896)).[2] The defendants therefore resist Fleet's suit by contending that, absent "complete preemption," federal subject matter jurisdiction is lacking for a declaratory judgment action that anticipates a federal preemption defense to a threatened state law enforcement action.

If Fleet's complaint sought only a declaratory judgment, the defendants' jurisdictional challenge would appear to be entirely correct, subject only to an uncertainty we consider below. However, the complaint also seeks an injunction to prohibit the Commissioner from applying section 36a-156 to prohibit Fleet's imposition of the surcharge fee. Fleet contends that its request for an injunction brings it within the scope of Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), in which the Supreme Court sustained federal court jurisdiction over a lawsuit seeking both declaratory and injunctive relief to prevent enforcement of a provision of New York's Human Rights Law, N.Y. Exec. Law §§290-301 (McKinney 1982 & Supp. 1982-83), on the ground that the state law was preempted by ERISA. The defendants respond that Shaw is an ERISA case and is to be distinguished from the pending case because Fleet's preemption contention does not invoke a federal law that accomplishes "complete preemption," whatever its specific preemptive effect on section 36a-156 might be.

Initially, we note that it is not as clear as the defendants contend that Shaw is an instance of "complete

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[2] Although no court has held that the National Bank Act preempts all state regulation of federally chartered banks, at least one court has held that the Act completely preempts state law usury claims against such banks. See M. Nahas & Co. v. First National Bank, 930 F.2d 608 (8th Cir. 1991).

preemption." ERISA claims are completely preempted when the plaintiff's state law claim for benefits is "displaced by ERISA's civil enforcement provision." Metropolitan Life, 481 U.S. at 60. Unlike Metropolitan Life, Shaw was not a removed state court suit by an employee seeking benefits; it was litigation initiated by employers and their insurer against the New York State Division of Human Rights and the Division's Commissioner and General Counsel.[3] See Shaw, 463 U.S. at 92 & n.7. The plaintiffs sought to prevent the state agency from requiring them to alter their employee benefit plans to include disability benefits due to pregnancy. See Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287, 1290 (2d Cir.), modified, 666 F.2d 21 (2d Cir. 1981), aff'd in part, vacated in part, 463 U.S. 60 (1983). Though the litigation might arguably have been regarded as a suit anticipating an eventual claim by a pregnant female employee for benefits required to be provided by state law, there is no indication that the parties advanced this view, and no such plaintiff was party to the suit. In fact, in the District Court the only employees whose rights were invoked were those of the employers' male employees, on whose behalf the employers sought to assert the right to be free of what was alleged to be the discriminatory effect of the state law requirement. See Delta Air Lines, Inc. v. Kamarsky, 485 F. Supp. 300, 303 (S.D.N.Y. 1980). Most significantly, the Supreme Court's opinion, particularly its discussion of subject matter jurisdiction, made no reference to the "complete preemption"

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[3] The employers also sought relief against the State Workmen's Compensation Board and its chairman, arguing that ERISA preempted the State's Disability Benefits Law, N.Y. Work. Comp. Law §§ 200-242 (McKinney 1965 & Supp. 1982-83). The Supreme Court held that ERISA did not preempt the disability statute. See Shaw, 463 U.S. at 106-08.

doctrine of Metropolitan Life, and did not cite that decision at all.

On the contrary, the Supreme Court explicitly upheld subject matter jurisdiction in Shaw on an entirely different basis -- the fact that the plaintiffs were seeking injunctive relief to prevent state officials from interfering with a federal right:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex parte Young, 209 U.S. 123, 160-62 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. See Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199-200 (1921); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908); see also Franchise Tax Board [v. Construction Laborers Vacation Trust, 463 U.S. 1], at 19-22, and n. 20 [1983]; Note, Federal Jurisdiction over Declaratory Suits Challenging State Action, 79 Colum. L. Rev. 983, 996-1000 (1979). This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture. See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978); Jones v. Rath Packing Co., 430 U.S. 519 (1977); Florida Lime &

> Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941).

Shaw, 463 U.S. at 96 n.14 (emphases added).

This explication of subject matter jurisdiction, with its pointed reliance on a plaintiff's seeking injunctive relief, appears to create a sharp distinction between preemption claims asserted in complaints seeking only a declaratory judgment, for which Caterpillar and Wycoff indicate that federal court jurisdiction would be lacking under the well-pleaded complaint rule, and preemption claims asserted in complaints seeking an injunction.[4] Moreover, the same day the Court decided Shaw, it also decided Franchise Tax Board. In the latter case, the Court noted with apparent approval cases upholding federal jurisdiction where a plaintiff seeks to enjoin application of allegedly preempted state regulations and stated that "a declaratory judgment action by the same person does not necessarily run afoul of the Skelly Oil doctrine." Franchise Tax Board, 463 U.S. at 20 n.20 (emphasis added) (citing Lake Carriers' Ass'n v. MacMullen, 406 U.S. 498, 506-08 (1972), Rath Packing Co. v. Becker, 530 F.2d 1295, 1303-06 (9th Cir. 1975), aff'd sub nom. Jones v. Rath Packing Co., 430 U.S. 519 (1977), and First Federal Savings & Loan Ass'n v. Greenwald, 591 F.2d 417, 423 & n.8 (1st Cir. 1979)). The implication seems to

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[4] The tension between the bar to anticipating federal defenses, exemplified by the language in Caterpillar and Wycoff, and the allowance of jurisdiction over claims for injunctive relief, as in Shaw, has been noted. See Playboy Enterprises, Inc. v. Public Service Commission, 906 F.2d 25, 29-31 (1st Cir. 1990); Henry Paul Monaghan, Federal Statutory Review under Section 1983 and the APA, 91 Colum. L. Rev. 233, 238-39 (1991).

be that jurisdiction exists if "the same person" seeking a declaratory judgment also seeks an injunction.

However, after Shaw and Franchise Tax Board, the Supreme Court has given some indication that a declaratory judgment plaintiff may invoke federal jurisdiction to assert insulation from preempted state laws, even without seeking an injunction. In Lawrence County v. Lead-Deadwood School District No. 40-1, 469 U.S. 256 (1985), the Court considered a case that had originally been brought in a federal court, seeking a declaratory judgment that a state law conflicted with a federal law. The District Court had granted the declaratory judgment, but the Court of Appeals had reversed for lack of jurisdiction, relying on Wycoff. See Lawrence County v. South Dakota, 668 F.2d 27, 31 (8th Cir. 1982). The unsuccessful federal court plaintiff then sued in state court, and the Supreme Court reviewed the merits of the Supremacy Clause claim on an appeal from the South Dakota Supreme Court. In a footnote significant to our litigation, the Court observed that the Eighth Circuit's dismissal had been erroneous. The Court explained why in this somewhat perplexing language:

> This [dismissal] ruling was erroneous. In Shaw v. Delta Air Lines, 463 U.S. 85 (1983), we granted declaratory relief to a party challenging a state statute on pre-emption grounds, reaffirming the general rule that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have

> jurisdiction under 28 U.S.C. § 1331 to resolve." Id. at 96 n.14.

Lawrence County, 469 U.S. at 259 n.6 (emphases added) (second brackets in original). Possibly, this language was intended only to echo the point made in Franchise Tax Board that a declaratory judgment may be given in a suit by the "same person" who also seeks an injunction on preemption grounds, yet the Eighth Circuit dismissal that the Supreme Court called erroneous occurred in a suit seeking only a declaratory judgment. The force of whatever meaning is to be drawn from the Lawrence County footnote is diminished by the fact that the footnote is dictum, since the Eighth Circuit's rejection of jurisdiction was irrelevant to the Supreme Court's later consideration of the appeal from the South Dakota Supreme Court.

Also clouding the matter is the Supreme Court's view of Wycoff as a case that held jurisdiction lacking because the controversy was not ripe, thus leaving in doubt the continued significance of the language in Wycoff invoking the well-pleaded complaint rule. See Lake Carriers, 406 U.S. at 508 n.12 ("Wycoff Co. was a case `where a carrier sought relief in a federal court against a state commission in order "to guard against the possibility," [344 U.S.], at 244, that the Commission would assume jurisdiction.'") (quoting Public Utilities Commission v. United States, 355 U.S. 534, 538-39 (1958)).

Whether or not the Supreme Court would now uphold federal court jurisdiction over a complaint alleging preemption and seeking only a declaratory judgment, Fleet's suit is arguably within the line of cases illustrated by Shaw and the cases cited in the Shaw footnote because Fleet seeks

an injunction. Nevertheless, we think Fleet's suit is distinguishable from Shaw and from the decisions it relies upon in a significant respect.

In Shaw and in all four of the preemption cases cited in the Shaw footnote in which plaintiffs sought injunctive relief against state officials to prevent enforcement of state laws alleged to be preempted, Ray, Jones, Florida Lime & Avocado Growers, and Hines, the plaintiffs acknowledged that the state law regulated them in the manner that the state officials were asserting. No issue was raised concerning the interpretation of state law.[5] By contrast, Fleet enters the District Court to obtain an interpretation that the relevant state law, §36a-156, does not, as a matter of state law, prevent its imposition of the surcharge fee. Only if Fleet loses on this state law ground does it need to advance the contention that the state statute is preempted. Thus, the issue in this case is whether a plaintiff that disputes a state official's interpretation of state law can invoke federal question jurisdiction to seek a favorable construction of state law and, if unsuccessful in that effort, an injunction barring enforcement of the state law on the ground of preemption. We have found no decision explicitly considering this issue.

The context in which this issue arises bears some resemblance to the typical situation in which a plaintiff

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[5] In some cases properly invoking federal jurisdiction to consider preemption claims, state law must be examined by the federal court, not to determine whether it applies to the plaintiff, but to determine whether the nature of the interest regulated by state law is preempted by federal law. See e.g., Barnett Bank v. Gallagher, 43 F.3d 631, 634-36 (11th Cir. 1995) (state law examined to determine whether it is a regulation of insurance protected from federal regulation by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1994)), rev'd on other grounds, 517 U.S. 25 (1996).

invokes federal court jurisdiction to enjoin enforcement of a state law alleged to violate one of the Constitution's limitations to which the state is subject by virtue of the Fourteenth Amendment, and the federal court considers whether the state statute is subject to a limiting interpretation that avoids the constitutional issue. In that context, the federal court unquestionably has jurisdiction, notwithstanding the doubt concerning the meaning of state law, and the federal court sometimes construes the state law, see, e.g., Bad Frog Brewery v. New York State Liquor Authority, 134 F.3d 87 (2d Cir. 1998), and sometimes abstains pending state court interpretation, see, e.g., Lake Carriers, 406 U.S. at 509-13; Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). Even when it abstains, however, the federal court need not relinquish jurisdiction but may stay the federal case pending state court construction of the state statute, see, e.g., Confederated Salish v. Simonich, 29 F.3d 1398, 1407 (9th Cir. 1994), with the plaintiff free to return to federal court to pursue the constitutional issue if it has been specifically reserved from state court adjudication, see England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421 (1964).

However, preemption claims, though implicating the Supremacy Clause, have been recognized as presenting a constitutional issue of a lesser magnitude than suits challenging the authority of state officials on the ground that their actions will violate the substantive limitations of the Constitution. On this rationale, the Supreme Court ruled that a preemption claim, though resting on the Supremacy Clause, did not require the convening of the former statutory three-judge district court, see 28 U.S.C. § 2281 (1948) (repealed 1976), as was required for claims that allege "the traditional Due Process Clause, Equal Protection Clause,

Commerce Clause, or Contract Clause arguments." Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965). Moreover, some of the courts that have considered abstention inappropriate in preemption cases have pointed out that preemption claims under the Supremacy Clause do not present "substantial" constitutional issues. See, e.g., United Services Automobile Ass'n v. Muir, 792 F.2d 356, 364 (3d Cir. 1986); Federal Home Loan Bank Board v. Empie, 778 F.2d 1447, 1451 n.4 (10th Cir. 1985) (preemption questions based only on the Supremacy Clause considered not to be "the type of constitutional issues" warranting Pullman abstention); Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374, 377 (9th Cir. 1982) ("[n]o constitutional issues of substance" presented by preemption claim).

Though these court of appeals decisions somewhat downgrade constitutional issues arising under the Supremacy Clause, their refusal to permit Pullman abstention arguably offers support for Fleet's claim that subject matter jurisdiction exists. However, in nearly all of the cases rejecting abstention in preemption cases, the state law was clear, and preemption was rejected because the plaintiff was entitled to submit its unavoidable preemption claim to a federal forum. See, e.g., Federal Home Loan Bank Board, 778 F.2d at 1451 (no issue raised as to meaning of state law); Kennecott Corp. v. Smith, 637 F.2d 181, 185 (3d Cir. 1980) (same); Chemical Specialties Manufacturers Ass'n v. Lowery, 452 F.2d 431, 433 (2d Cir. 1971) (same); see also Coker, 950 F.2d at 847 (same) (bankruptcy jurisdiction); cf. Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982) (abstention under Younger v. Harris, 401 U.S. 37 (1971), rejected where meaning of state law not disputed), aff'd sub nom., Arcudi v. Stone & Webster Engineering Corp., 463 U.S. 1220 (1983); Marshall v. Chase

Manhattan Bank (National Ass'n), 558 F.2d 680, 683-84 (2d Cir. 1977) (same). The absence of uncertainty concerning the meaning of state law was emphasized by Judge Friendly in rejecting a claim that a district court should have abstained in a suit claiming conflict between state and federal law. See Chemical Specialties, 452 F.2d at 433. In a rare instance where a court accepted subject matter jurisdiction in a preemption case despite uncertainty as to the meaning of state law, subject matter jurisdiction appears not to have been considered. See Association of International Automobile Manufacturers, Inc. v. Abrams, 84 F.3d 602, 609-11 (2d Cir. 1996).

Thus we must consider whether the uncertainty of state law in a preemption case defeats federal court jurisdiction, which would otherwise exist under Shaw because Fleet's complaint requests an injunction (and perhaps even if only a declaratory judgment had not been sought). Several considerations persuade us that Shaw should be distinguished on this ground, with the result that subject matter jurisdiction is rejected. First, Shaw itself stands as something of an exception to the well-pleaded complaint rule that normally prevents a plaintiff, at least in declaratory judgment suits, from invoking federal court jurisdiction to anticipate its own federal defense to an apprehended enforcement action by state officials. It is one thing for the injunction request to trump the well-pleaded complaint rule in cases where the plaintiff does not dispute the application of the allegedly preempted state law; it is quite a different thing when the plaintiff comes to federal court requesting that court to construe state law to be inapplicable, and asserts federal preemption as a contention in reserve for use only if the initial claim is rejected.

Second, recognizing federal court jurisdiction over preemption claims involving state laws of uncertain meaning will propel federal courts into consideration of at least three threshold issues before they ever reach the potential preemption issue. The federal court would have to consider whether the state law is unclear in its application to the plaintiff; then the court would have to consider whether any uncertainty alleged by the plaintiff makes the case appropriate for Pullman abstention (an issue not arising where the applicability of state law is not disputed); if not, the court would then have to construe the state statute. In some cases, the federal court would also have to decide whether federal court construction of the state statute will so interfere with the state's enforcement of an administrative scheme as to warrant abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943). All of these issues are avoided if the plaintiff is obliged either to proceed in state court to litigate its claim that state law does not mean what the state official says it means or to forgo its state law contention and litigate only its preemption claim (seeking not only a declaratory judgment but also an injunction that might be necessary in order to invoke Shaw).

Third, proceeding in federal court in a suit such as this potentially raises Eleventh Amendment concerns in light of the Supreme Court's decision in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984). Pennhurst made clear that the Eleventh Amendment prevents a federal court from granting injunctive relief against a state official on the basis of state law. Thus, if a federal court were to construe state law in favor of a plaintiff challenging the application of state law, the court could not enforce that judgment by issuing an injunction. Though that consequence does not disable a federal court from adjudicating a state law issue,

which if resolved in favor of the plaintiff would avoid a constitutional issue, it weighs against expanding Shaw to make further inroads on the well-pleaded complaint rule in suits involving uncertain state law.[6]

Finally, we have serious concerns that opening the federal courts to preemption claims by plaintiffs raising disputes about the meaning and application of state law risks a major and unwarranted incursion on the authority of state courts to construe state statutes. In almost every area in which state law regulates private conduct, some federal statute can arguably be invoked by the private party to

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[6] We do not mean to suggest that Pennhurst's denial of subject matter jurisdiction over a pendent state law claim against a state official itself establishes a bar to subject matter jurisdiction in this case. In Pennhurst, the state law claim was an alternative basis for affording the plaintiffs relief, paralleling, yet existing distinct from, their federal constitutional claim. Cf. Schacht, 118 S. Ct. at 2052-53 (Eleventh Amendment defense to separate claim does not bar federal jurisdiction over distinct claims). In our case, the state law claim, though entitling the plaintiff to declaratory relief if its claim on the merits is upheld, is not entirely distinct from the federal preemption claim. Instead, in reality it presents an independent issue preliminary to the federal claim. A state law issue that is preliminary to a federal claim against a state official is not a pendent state law claim that Pennhurst prevents a federal court from adjudicating. See Propper v. Clark, 337 U.S. 472 (1949) (state law issue concerning title antecedent to federal claim concerning authority of federal Alien Property Custodian). We invoke Pennhurst only to indicate that its bar to injunctive relief on state law grounds weighs against entertaining a declaratory judgment claim involving unsettled state law.

Even if Pennhurst should be understood to bar a federal court from adjudicating, against a state, a state law issue that is preliminary to a preemption claim, the Eleventh Amendment would not be an independent reason for dismissing Fleet's suit. Though the Amendment may be raised as a defense either in the trial court or on appeal, see Edelman v. Jordan, 415 U.S. 651, 678 (1974) (citing Ford Motor C. v. Department of Treasury, 323 U.S. 459, 466-67 (1945)), the defendants have not done so in this litigation.

provide the basis for a preemption claim. Sometimes the preemption claim will be so attenuated as not to present a substantial federal question warranting federal question jurisdiction. But in many cases, if subject matter jurisdiction is accepted, a colorable preemption claim would oblige the federal court to determine, as a matter of state law, the authority of state officials to act. Even if the preemption claim is insubstantial, some federal courts might be tempted to proceed directly to the state law issue in order to avoid exploring an often complex federal regulatory scheme. The result would be an open invitation to parties disputing a state's claim as to the meaning of state law to have a federal court determine the issue. That is an ill-advised use of federal question jurisdiction.

Rejection of federal question jurisdiction for preemption claims where the plaintiff disputes the meaning and application of state law is especially appropriate in a case such as the one now pending because the defendants are an official and an agency of a state. In Franchise Tax Board, the Supreme Court rejected federal jurisdiction primarily on the ground that the state agency, suing to collect taxes in that litigation, should be free to proceed in state court to vindicate its asserted state interest, leaving the putative state court defendant free to assert its preemption claim as a defense to a state court action.[7] See Franchise Tax Board, 463 U.S. at 21. Fleet's suit not only seeks to litigate the meaning of state law and, only if unsuccessful, a preemption

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[7] In Franchise Tax Board, the putative state court defendant might have been able to invoke federal court jurisdiction under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), but such an action would have been to satisfy the requirements of the Tax Injunctive Act, 28 U.S.C. § 1341. See Franchise Tax Board, 463 U.S. at 19-20 & n.21.

claim, but it also amounts to a preemptive strike, obliging the state defendants to pursue their state law claim in federal court, instead of the state court forum they might prefer. On this issue, the Supreme Court's words in Wycoff are especially pertinent:

> State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State.

Wycoff, 344 U.S. at 247. Though Fleet, like any plaintiff, may invoke federal question jurisdiction to adjudicate an unadorned claim of federal preemption, at least in a suit seeking an injunction and possibly only a declaratory judgment, it should not be accorded the opportunity to use a preemption claim as a way to force a state to adjudicate in a federal court the meaning of a state regulatory statute.

It is arguable that where a plaintiff seeking an injunction on the ground of preemption also disputes the meaning and application of state law, a federal court should accept subject matter jurisdiction and then consider on its own motion whether the uncertain nature of state law warrants abstention, or perhaps certification. We reject that course because it would expand Shaw to uphold jurisdiction beyond instances where the meaning of state law is undisputed, it would make an additional inroad on the

well-pleaded complaint rule, and it would needlessly oblige a federal court to grapple with the often subtle issue of Pullman abstention.

All of these considerations persuade us that Shaw does not extend beyond instances where the plaintiff, seeking an injunction on the ground of preemption, does not dispute the meaning and application of state law.[8] By rejecting subject matter jurisdiction, we leave plaintiffs like Fleet on notice that if they dispute the meaning of state law in preemption cases, they should proceed initially and promptly to state court for an authoritative construction of state law.[9]

Though it is possible that the Supreme Court, when it one day confronts the precise jurisdictional issue posed by this case, will inform us that the Shaw footnote authorizes federal court jurisdiction for suits to enjoin state officers from enforcing allegedly preempted statutes not only when the meaning of those statute is undisputed but also when the meaning is disputed, we conclude that the policy behind the well-pleaded complaint rule and the risk of routinely opening the federal courts to suits seeking interpretation of state laws preclude sustaining jurisdiction in this case.

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[8] We have no occasion to consider a situation where the plaintiff makes solely a preemption claim, and the federal court, on its own motion, raises an issue as to the meaning and application of state law. Fleet's complaint explicitly asserts that state law, properly construed, does not bar the surcharge fee.

[9] Since we conclude that the District Court lacks subject matter jurisdiction, we have no occasion to consider the defendants' argument that the state law question should have been certified to the Connecticut Supreme Court.

Since a plaintiff asserting federal preemption of an indisputably applicable state statute has a clear right to obtain a federal court resolution of its preemption claim, see Concerned Citizens v. New York State Dep't of Environmental Conservation, 127 F.3d 201, 206 (2d Cir. 1997), we believe that a plaintiff left to state court because its preemption claim might be mooted by a state law construction in its favor should be entitled, if it wishes, to reserve the preemption issue from state court adjudication, and come to federal court in the event that the state court construes state law adversely to it. That is the procedure recognized by the Supreme Court when a federal court abstains under Pullman, see England, 375 U.S. at 421, and it is equally applicable in this case.

CONCLUSION

We therefore vacate the judgment of the District Court and remand with directions to dismiss the complaint, without prejudice, for lack of subject matter jurisdiction. No costs. The mandate shall issue forthwith.

CTNY/NHCT [Filed Jan. 14, 1999]

97-cv-133
Arterton

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of January, one thousand nine hundred and ninety-nine.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE DENNIS JACOBS,
Circuit Judges.
HONORABLE ELLEN BREE BURNS,*
District Judge.

FLEET BANK, NATIONAL ASSOCIATION,
Plaintiffs-Appellee,

v.

THE HONORABLE JOHN P. BURKE, Banking Commissioner of the State of Connecticut,

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* Of the United States District Court for the District of Connecticut, sitting by designation.

and CONNECTICUT DEPARTMENT OF BANKING, a State Agency,

Defendants-Appellants.

ORDER

Upon consideration of the Plaintiff-Appellee's petition for rehearing, supported by the amicus curiae brief of the Comptroller of the Currency "the Comptroller," and the response of the Defendants-Appellants, it is hereby ORDERED that the mandate is recalled for the limited purpose of amending the opinion by deleting at slip opinion, page 252, lines 10-11, "doctrine of Metropolitan Life, and did not even cite that decision at all." and substituting "doctrine." In all other respects, the petition for rehearing is DENIED. The claim of the Plaintiff-Appellee, supported by the Comptroller, concerning the allegedly exclusive enforcement authority of the Comptroller, is presented too late to warrant consideration in this litigation; moreover, that claim is currently pending in separate litigation now pending in the District Court. Our opinion in this litigation is not intended to deny the District Court any jurisdiction, otherwise available, over a complaint that omits a claim requiring construction of state law.

FOR THE COURT,
CAROLYN CLARK CAMPBELL, CLERK

by: /s/ Lucille Carr
Lucille M. Carr, Operations Manager

CTNY/NHCT [Filed Nov. 10, 1998]
97-cv-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
MANDATE NEW YORK 10007 **AMENDED**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 9th day of November, one thousand nine hundred and ninety-eighth.

BEFORE: Hon. Jon O. Newman,
Hon. Dennis Jacobs,
Circuit Judges.
Hon. Ellen Bree Burns,*
District Judge.

Docket Nos. 98-9324

FLEET BANK, NATIONAL ASSOCIATION,

Plaintiff-Appellee,

-v-

THE HONORABLE JOHN P. BURKE,

Issued As Mandate: 1-14-99

* The Honorable Ellen Bree Burns, of the United States District
Court for the District of Connecticut, sitting by designation.
Banking Commissioner of the State of
Connecticut, and CONNECTICUT DEPARTMENT
of BANKING, a State Agency,

Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, AND DECREED** that the judgment of said district court be and it hereby is vacated and case remanded with directions to dismiss for lack of subject matter jurisdiction in accordance with the opinion of this court.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By:

/s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

Filed - Feb. 4, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ***4th*** day of ***February*** one thousand nine hundred and ninety-nine.

FLEET BANK, NATIONAL ASSOCIATION,

Plaintiff-Appellee,

-v-

Docket No. 98-9324

THE HONORABLE JOHN P. BURKE, ET AL.,

Defendants-Appellants.

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellee Fleet Bank, National Association.

And the panel that decided the appeal having denied the petition for rehearing in an order filed January 14, 1999.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Carolyn Clark Campbell
By:

_____

Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Fleet Bank, N.A.	)	3:97CV00133(JBA)
v.	)	
John P. Burke,	)	Emergency Notice
Banking Commissioner,	)	of Motion for
et al.	)	Stay Pending Appeal

[Filed Oct. 12, 1998]

MOTION BY:

Richard Blumenthal, Attorney General
William J. Prensky, A.A.G.
110 Sherman Street
Hartford, CT 06105

Judge or agency whose order is being appealed:

Janet B. Arterton

Brief Statement of the Relief Requested:

Stay of Ruling on Cross-motions for Summary Judgment pending appeal in this Court.

By:

_____
William J. Prensky
Assistant Attorney General

Appearing for:

_____
John P. Burke,
Banking Commissioner
and Department of
Banking

10-10-98

ORDER

PRESENT: Hon. Ralph K. Winter, Ch. J., Hon. Dennis Jacobs, Hon. Robert D. Sack, C.JJ.

IT IS HEREBY ORDERED that the motion be, and it hereby is, GRANTED to the extent that a stay in the nature of an injunction against the charging of the fees is entered until 5:00 p.m. on the day the appeal is heard. The appeal is expedited for oral argument to the panel sitting on Friday, October 23, 1998. Simultaneous filing of both main briefs is due by telefax in the Clerk's Office by 5:00 p.m. on Monday, October 19, 1998 (hard copies to be delivered the following day by 12:00 noon by Federal Express, or other overnight courier), and simultaneous filing of reply briefs is due by telefax in the Clerk's Office by 5:00 p.m. on Wednesday, October 21, 1998 (hard copies to be delivered the following day by 12:00 noon by Federal Express or other overnight courier).

FOR THE COURT:
CAROLYN CLARK CAMPBELL,
Clerk
by

Date: 10/12/98

Beth J. Meador,
Administrative Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of October, one thousand nine hundred and ninety-eight.

BEFORE:

HON. JON O. NEWMAN,
HON. DENNIS JACOBS,
Circuit Judges,
HON. ELLEN BREE BURNS,
District Judge.*

_____x

FLEET BANK, N.A.,

v. 98-9324

JOHN P. BURKE, Banking
Commissioner, et al.

_____x

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* Hon. Ellen Bree Burns, of the United States District Court for the District of Connecticut, sitting by designation.

A motion having been made to extend the October 12, 1998, stay in the nature of an injunction against the charging of fees,

IT IS HEREBY ORDERED that the motion is DENIED.

FOR THE COURT:
Carolyn Clark Campbell, Clerk
By:

_____

[Filed Sep. 30 8:15 p.m. '98]
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION,	:	
Plaintiff,	:	
v.	:	NO. 3:97cv133 (JBA)
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER and CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,	:	
Defendants.	:	

RULING ON CROSS SUMMARY JUDGMENT MOTIONS
[DOCS. #24 & #28]

INTRODUCTION

Fleet Bank ("Fleet") seeks by way of declaratory judgment a determination that John P. Burke, the State Banking Commissioner ("Commissioner") acting on behalf of the Connecticut Department of Banking is incorrect in his interpretation of Connecticut statutes, specifically C.G.S. §36a-156, as precluding Fleet from imposing a transaction fee ("surcharge fee") on non-depositors who access their

bank accounts via Fleet's Automatic Teller Machines ("ATMs").

Pending before the Court are the parties cross-motions for summary judgment. The Court has previously determined that Pullman abstention was not appropriate. See Ruling on Defendant's Motion to Dismiss dated Aug. 10, 1997 (doc. #21).

BACKGROUND

Fleet is a nationally-chartered bank that operates branches and ATMs in the State of Connecticut and in other states. (Joint Stipl. ¶ 2). The defendants are the Commissioner and the Connecticut Department of Banking, ("Banking Department") who are responsible for the general administration and implementation of the banking laws of the State of Connecticut pursuant to C.G.S. § 36a-1 to 36a-810.

Currently, Fleet owns and operates approximately 365 ATMs throughout the state of Connecticut as well as over 2,000 ATMs throughout Massachusetts, Maine, New Hampshire, Rhode Island, New York, New Jersey. (See Def. Memorandum of Law in support of Motion for Summary Judgment, App. A). Fleet is also a member of three ATM networks: CIRRUS, NYCE and PLUS. (Joint Stipl. ¶ 4) Through these networks, member banks like Fleet enable their depositors to access their accounts and transact business using another network bank's ATM. (Joint Stipl. ¶ 4). The advantage of these arrangements to the banks and to their depositors is that they increase the number of potential outlets where banking transactions may be conducted. As part of these networks, Fleet permits non-depositors who hold ATM cards issued by other network banks access to its ATMs. In return, Fleet depositors may access their accounts via ATMs maintained by any other bank within the network. Under these network

arrangements, the member banks agree to uniform policies and rights including the type of charges permitted for using and accessing another member bank's ATM. (Joint Stipl. ¶ 4).

Under the current network arrangements, a host member bank potentially has three methods for defraying or recovering its costs of installing and operating its ATMs and of sharing them with other banks and their depositors. First, the host bank could impose an "interchange fee" on the network bank whose depositor accesses the host bank's ATM. (Joint Stipl. ¶ 6). Second, the host bank could impose a direct charge or "surcharge fee" on the non-depositor that accesses its ATM. (Id.) Finally, any network bank could impose a "transaction fee" on its own depositor for his or her use of any ATM in the network, including its own. Therefore, a single ATM transaction at a network bank could result in imposition of at least two different charges on the ATM user and one "interchange fee" on the user's bank. It is the second host bank fee, the "surcharge fee" on non-depositor users that is in dispute in this case.

On September 14, 1995, Fleet sought an opinion from the Commissioner "seeking confirmation . . . that a state chartered bank permissively may charge a direct transaction fee for the use of such bank's ATM by a person who does not otherwise maintain a banking relationship with the bank . . . to recoup a portion of the expenses incurred by the bank to establish and maintain the ATM" and "that the Connecticut statutes governing the use of ATMs in Connecticut would not place any restriction on the ability of a federally chartered bank in Connecticut to impose similar fees . . . ." (Joint Stipl. Ex. B) In his September 14, 1995 letter in response, the Commissioner reiterated his predecessor's position adopted in 1988 (Joint Stipl. Ex. A) that "surcharge fees" were not permissible under Connecticut state banking laws. (Joint Stipl. Ex. B). The Commissioner, rejecting Fleet's position, opined as follows:

> The Connecticut statutes governing the establishment and use of ATMs do not authorize banks to impose the transaction fees described [. . .]. Moreover, Section 36a-156 of the Connecticut General Statutes specifically authorizes a bank that has established an ATM to impose a usage fee on other banks whose customers use the ATM to cover a reasonably proportionate share of all acquisition, installation and operating costs. It is an established rule of statutory construction that a statute which provides that a thing done in a certain way carries with it an implied prohibition against doing that thing in another way. See State ex. rel. Barlow v. Kaminsky, 144 Conn. 612 (1957). Therefore, Section 36a-156, which provides a bank may charge another bank that uses its ATM a fee for its use, carries with it an implied prohibition against the bank imposing a fee on the customers of the other bank for such use. ... A state-chartered or federally-chartered bank in Connecticut that wishes to recoup the expenses incurred in establishing and maintaining an ATM may do so by imposing the usage fee permitted under Section 36a-156 on other banks whose customers use the ATM.

(Joint Stipl. Ex. B).

The Commissioner interprets Connecticut's ATM statute as containing an implicit prohibition on Fleet's ability to charge non-depositors a surcharge fee for their use of Fleets ATMs. (Id.) It is the proprietary of this interpretation of the Connecticut banking laws that is challenged by Fleet.

Connecticut banking laws include several provisions specifically related to the establishment and operation of ATMs in the state, C.G.S. §§ 36a-155 et. seq. ("ATM statute"). These statutes address the following areas: 1) banks' and credit unions' establishment of ATMs and the banking commissioner authority to adopt regulations (C.G.S. §36a-155(a)); 2) banks' access to others' ATMs for a fee (C.G.S. §36a-156); 3) satellite devices and point of sale terminals not branch offices (C.G.S. §36a-157); 4) use of ATMs by out of state banks and credit unions (C.G.S. §36a-158); and 5) rights of banks and credit unions to establish and use point of sale terminals vis-a-vis national banks (C.G.S. §36a-159).

The Commissioner has also applied the Depositor's Account Contract Act or ("DACA"), C.G.S. §36a-316 through 329, to the use of ATMs by depositors. Although DACA does not explicitly refer to ATMs, it regulates the information and manner in which a bank must disclose to its depositors the amount of charges relating to their deposit accounts. Under the Commissioner's interpretation of DACA's definition section, C.G.S. §36a-316(6)(D), a bank is permitted to charge its own depositors an ATM transaction fee, based on his construction that an ATM is "a device or method that may be used to withdraw money from a deposit account." (Joint Stipl. Ex. A). However, under the Commissioner's interpretation, DACA is inapplicable if the ATM user is not a depositor and thus, in the Commissioner's view, DACA provides no authority for the disputed "surcharge fee" for nondepositors' use of Fleet's ATMs.

SUMMARY JUDGMENT STANDARD

When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other. "Rather the court must evaluate each party's motion on its merits, taking care in each instance to draw all inferences against the party

whose motion is under consideration." Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993).

In this case, the parties have filed a joint stipulation of facts and neither side has identified any unresolved factual issues. (See Joint Stipl.) Furthermore, the Court has independently reviewed the record and concluded that there are no disputed facts and the dispositive issue is purely a question of statutory interpretation particularly appropriate for resolution by summary judgment. Heublein, Inc., 996 F.2d at 1461.

DISCUSSION

I. Relation of state banking laws to federally chartered banks

In Connecticut, there exist two types of banks, state-chartered and federally-chartered banks. Both types lack inherent power beyond those powers enumerated or incidentally conferred under the relevant federal (12 U.S.C. §24) or state (C.G.S. §36a-250) banking law. Fleet contends its authority to impose a "surcharge" fee on non-depositors who access its ATMs is found in the "incidental" powers granted under the National Banking Act, 12 U.S.C. §24 (Seventh). (Complaint ¶ 10, 19). This provision of the National Banking Act authorizes a bank to:

> Exercise by its board of directors or duly authorized officers or agents, subject to the law all such incidental powers as shall be necessary to carry on the business of banking.

12 U.S.C. §24 (Seventh).

Furthermore, under 12 C.F.R. §7.4002, Fleet claims that a national bank is expressly permitted to charge its customers non-interest charges and fees for the services the

bank performs. Fleet claims that non-depositor ATM users qualify as "customers" and therefore may be assessed a surcharge fee.

A national bank's enumerated and incidental powers are not normally limited by, but rather ordinarily pre-empt contrary state law. Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996) (finding that federal law preempted Florida law which would have prohibited national banks from selling insurance). Nonetheless, federal banks are subject to state regulations provided they do not prevent or significantly interfere with the national bank's exercise of its powers. See Anderson National Bank v. Luckett, 321 U.S. 233, 248 (1944) ("national banks are subject to state laws, unless those laws infringe upon the rights and privileges of national banks"). However, not all differences between federal and state banking laws are deemed substantial conflicts implicating the doctrine of preemption and the issue of preemption would not arise unless the Court finds significant conflict between the Connecticut ATM statute and Fleet's claimed right under federal law. However, the relief sought by Fleet is not confirmation that it does indeed have the authority to impose a surcharge under federal banking law, but rather only that the Connecticut ATM statutes do not prohibit such a fee. Only if the Court affirms the Commissioner's interpretation of C.G.S. §36a-156 does it become necessary to determine what federal banking laws and regulations permit in order to assess the existence of conflict thus triggering a preemption analysis. Given the staged analysis required, the parties have agreed that determination of the plaintiff's pre-emption claims should be deferred.

II. Standard of review of Commissioner's statutory interpretation

In determining the correctness of the Banking Commissioner's interpretation of C.G.S. §36a-156, the Court

follows Connecticut's own rules of deference to its agency's statutory interpretation under circumstances where there has been no prior state judicial interpretation of the statute at issue. In general, federal courts give great deference to the judgment of administrative agencies that are in charge of enforcing the statute at issue. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Similarly, Connecticut courts defer to the statutory interpretation of Connecticut administrative agencies with such enforcement powers. Nichols v. Warren, 209 Conn. 191, 202, (1988). However, the Connecticut Supreme Court has clarified that where a state statute is interpreted by a state administrative agency in the first instance, and has not previously been subjected to judicial scrutiny, such statutory construction is a question of law and the agency interpretation is not entitled to any special deference. Id. at 203; Bursinkas v. Dep't of Social Serv., 240 Conn. 141, 147 (1997). In this case, the Commissioner's statutory interpretation is not embodied in any enforcement regulation, guideline, policy statement, or administrative adjudication but is instead, the Commissioner's statutory interpretation in response to a private inquiry. Accordingly, under these circumstances, the Court will construe the ATM statute at issue de novo.

III. Statutory Construction

The Commissioner asserts that this statute's silence regarding other types of permissible ATM fees implies a legislative intent to restrict banks from collecting any other type of ATM fee, including one directly imposed by banks upon users of their ATMs. The Commissioner contends that the explicit creation of one form of charge for ATM use--the interchange fee permitted to be charged to other member banks--necessarily implies that all other types of ATM charges are precluded. Therefore, the Commissioner reasons that the grant of an express right to impose an interchange fee necessarily precludes the right of any bank to levy any additional fee, such as the disputed direct "surcharge fee."

As stated in its two opinion letters and reiterated throughout this litigation, the Commissioner bases its interpretation on the concept of expressio unius est exclusio alterius--"[t]he statutory interpretation meaning that the expression of one thing is the exclusion of another." Black's Law Dictionary 581 (6th ed. 1990). In Barlow v. Kaminsky, 144 Conn. 612 (1957), the Connecticut Supreme Court, interpreting the governor's statutory power of appointment, found that "a statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. An enumeration of powers in a statute is uniformly held to forbid things not enumerated." In relying upon Barlow and its progeny, the Commissioner contends that when the legislature authorized banks to charge an "interchange fee" for making their ATMs available to other banks, it implicitly limited the bank's ability to impose any other type of fee on the individual user.

However, application of exclusio unius is most appropriate when a statute demonstrates this intent by its enumeration of an exhaustive listing of specific powers. Barlow, 144 Conn. at 620. In contrast, C.G.S. §36a-156 and the related ATM statutes do not purport to enumerate specific powers of banks with respect to their ability to directly impose individual ATM transaction fees and charges. The focus and purpose of C.G.S. §36a-156(a), by its language is to ensure that banks share their ATMs nondiscriminatorily for which they are entitled to be compensated:

> (a) One or more banks, Connecticut credit unions or federal credit unions which have established a satellite device or point of sale terminal shall make the satellite device or point of sale terminal available on a nondiscriminatory basis for use by any other bank, Connecticut credit union or federal credit union, upon payment by each such

> other bank or credit union of a reasonably proportionate share of all acquisition, installation and operating costs of the satellite device or point of sale terminal. The satellite device or point of sale terminal shall identify with equal prominence all of the banks, credit unions or network systems which use the satellite device or point of sale terminal.

Unlike the pertinent federal and state statutes which enumerate the powers of national and state banks, the ATM statute does not purport to provide an exhaustive list of permitted ATM fees, thus undermining the Commissioner's theory of preclusion by silence. See C.G.S. §36a-250 (enumerating the specific powers of Connecticut banks); 12 U.S.C. §24 (1997) (enumerating the powers of national banks).

In addition, Connecticut courts have stated that "if the statutory language is clear and unambiguous... courts cannot, by construction read into statutes provisions which are not clearly stated." Frazier v. Manson, 176 Conn. 638, 642 (1979). Since the clear language of the statute only relates to the non-discriminatory access among ATMs, inferring the specific preclusive intent urged by the Commissioner is not justified. As one commentator has observed, the canon of expressio unius est exclusio alterius in the context of statutory interpretation "is a questionable one in light of the dubious reliability of inferring specific intent from silence." Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2109 n.182 (1990).

Next, the Commissioner supports its statutory interpretation by reference to the legislative history, intended policy and surrounding circumstances of C.G.S. §36a-156(a)'s passage. Although resort to legislative history is only necessary where a statute's language is ambiguous,

which this statutory language is not, a review of the proffered legislative history results in the conclusion that it does not support the Commissioner's interpretation. The purpose and policy behind the ATM legislation when it was enacted in 1976 was to permit Connecticut state chartered banks the ability to compete with national chartered banks that were already permitted the ability to operate ATMs based on the Office of Comptroller of Currency's (OCC) interpretation of federal law. 18 Conn. H.R. Proc. pt. 10, 1975 Sess. 4868-4869. The legislative intent of §36a-156(a) was to ensure that ATM machines, devices and terminals remained available to state banks and credit unions. Id.

The Commissioner references from the legislative history a single colloquy between Representatives Webber and Lyddy during General Assembly consideration of C.G.S. §36a-156. Even though such floor debates on a statute under consideration are not controlling on statutory interpretation, the Court may take judicial notice of such legislative debate. Iovieno v. Comm'r, 222 Conn. 254 (1992), Tax Comm'r v. Estate of Bissell, 173 Conn. 232 (1977).

> **REP. WEBBER (92ND):** "Thank you. If one were to use this service at a supermarket, [sic] at the check-out counter, would that individual be charged a fee for the use of that service?"
>
> **THE DEPUTY SPEAKER:** The gentlemen from the 126th if he cares to respond.
>
> **REP. LYDDY (126th):** Through you Mr. Speaker. No.
>
> **THE DEPUTY SPEAKER:** The gentleman from the 92nd.

REP WEBBER: (92nd): If I understand the answer correctly, if a bank installs this very sophisticated piece of equipment in a super market [sic] for the convenience or at least to alleviate the problems at a check-out counter and the equipment, from what Mr. Lyddy tells us is costly, there shall be no charge, and I ask the question again, to the customer who uses it?

THE DEPUTY SPEAKER: The gentleman from the 126th if you care to respond.

REP. LYDDY (126th): Through you Mr. Speaker. No.

18 Conn. H.R. Proc. pt. 10, 1975 Sess. 4870-4871.

Commissioner suggests that this exchange between two legislators indicates a generalized legislative intent of Section 36a-156. Although "statements made on the house floor of the legislature are strong indications of legislative intent," Winchester Woods Assoc. v. Planning & Zoning Comm'n, 219 Conn. 303, 310-11 (1991), these predictive opinions offered while the bill was under consideration are not demonstrably traceable to the statutory language and cannot otherwise be imputed as the intent of the other 127 members of the legislature who voted for its passage. Pettigrew v. Thompson, 135 Conn. 228, 233 (1948) ("[I]t is impossible to tell how far proceedings before a committee or the views if an individual member actually entered into the determination by the legislature to pass a certain law.") The Court thus concludes that the legislative history does not support the Commissioner's statutory interpretation.

IV. Conclusion

Even though the Commissioner identifies some potentially anti-competitive and/or anti-consumer consequences of banks levying such "surcharge fees" in addition to other ATM transaction and interchange fees, the Court finds no Connecticut statute that prohibits their imposition. Given that the Connecticut ATM statute was enacted in 1976, long before many of the issues presented in this case could have been foreseen, the Court will leave to the state legislature and/or Congress any reexamination of the extent to which ATM fees should be regulated in light of the significant evolution in the use of electronic banking. As the Second Circuit observed with respect to issues under federal bank's use of ATMS under federal banking law: ". . .a perfect solution may not be within the power of the judiciary and may be better left to the legislative branch." Indep. Bankers Assoc. of New York State, Inc. v. Marine Midland Bank, 757 F.2d 453, 462 (2d Cir. 1985).

Finally, since the Court does not find that C.G.S. §36a-156(a) prohibits the imposition of surcharge fees, there is no need to address: 1) whether a national bank's authority to impose a surcharge fee falls within the "incidental powers" granted by the National Banking statute;[1] 2) whether a substantial conflict exists between the state and federal law, and 3) whether state law would be preempted by national banking law in this regard.

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[1] Based on the amicus curiae brief submitted by the Office of Comptroller of Currency ("OCC"), the federal agency responsible for administering the federal banking policies, the Court notes the OCC's position that a federal bank such as Fleet does have such an "incidental power" to operate ATMs under 12 U.S.C. §24 (Seventh), and corresponding permission to impose fees on services provide to any "customer" under 12 C.F.R. § 7.4002. Although "customer" is not currently defined under 12 C.F.R. §7.4002, OCC's current plain language interpretation of "customer" is anyone who voluntarily uses a bank's ATM regardless of whether that user is a depositor. (See Brief of the Office of the Comptroller of Currency, p. 7).

For the foregoing reasons, plaintiff Fleet's Motion for Summary Judgment [doc. #24] is GRANTED and the defendant Commissioner and the Banking Department's cross motion for Summary Judgment [doc #28] is DENIED.

IT IS SO ORDERED,

/s/ Janet Bond Arterton
Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut: September 30, 1998

[Filed - Oct. 5 11:09 a.m. '98]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION

v. Civil No. 3:97CV133(JBA)

THE HONORABLE JOHN P. BURKE Banking Commissioner of the State of Connecticut, and CONNECTICUT DEPARTMENT OF BANKING, a State Agency

JUDGMENT

This matter came on for consideration on cross motions for summary judgment before the Honorable Janet Bond Arterton, United States District Judge.

This Court has reviewed all of the papers filed in conjunction with the motions and after oral argument on September 16, 1998, entered a Ruling on Cross Summary Judgment Motions on September 30, 1998, granting the plaintiff's motion for summary judgment and denying the defendants' cross motion for summary judgment.

It is therefore ORDERED and ADJUDGED that judgment is entered for the plaintiff and the case is closed.

Dated at New Haven, Connecticut, this 5th day of October, 1998.

KEVIN F. ROWE, CLERK
By

Lori Inferrera
Deputy-in-Charge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION	:	
v.	:	**NO. 3:97cv133 (JBA)**
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT, THE CONNECTICUT DEPARTMENT OF BANKING	:	

RULING ON DEFENDANT'S MOTION TO DISMISS [DOC. #8]

Resolution of defendants' Motion to Dismiss requires the court to address the interplay between the doctrine of Pullman abstention and that of federal preemption. This action for injunctive and declaratory relief arises from the defendant Connecticut Banking Commissioner's interpretation of the state statutes governing the establishment and regulation of automatic teller machines ("ATMs"), Conn. Gen. Stat. § 36a-155 - 36a-159. Although the state statutes are silent on the subject of ATM fees to non-depositor customers, the defendant Banking Commissioner has construed § 36a-156 as not permitting a bank to charge a direct transaction fee to such ATM users. In this suit, plaintiff Fleet Bank, National Association ("Fleet") seeks a declaratory judgment that the Connecticut ATM statutes do not prohibit Fleet from charging fees to non-depositor customers using their ATM's, and that the

National Bank Act, 12 U.S.C. § 24 (Seventh), authorizes such a transaction fee or "surcharge," thus preempting the Connecticut ATM statutes. Fleet seeks to enjoin defendants from acting in any way to prevent, impede, or interfere with Fleet's charging fees to non-depositor customers using its ATMs.

The defendants move to dismiss, invoking the abstention doctrine articulated in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), contending that because the Connecticut ATM statutes have not yet been construed by any court, this court must abstain from consideration of this issue and permit it to be determined by Connecticut state courts in the first instance.

At issue in Pullman was an order of the Texas Railroad Commission which provided that no sleeping car could be operated on any railroad in Texas unless the car was continuously in the charge of a Pullman conductor. Prior to the order, trains having only one sleeping car were in the charge of a porter, while trains having two or more sleepers were in the charge of a Pullman conductor. Pullman porters were black and Pullman conductors were white. Id. at 497-98. The Pullman Company and the railroads challenged the Commission's order as unauthorized by Texas law, as well as violative of the Equal Protection, the Due Process and the Commerce Clauses of the United States Constitution. The intervening porters adopted these claims, but principally objected to the order as discriminating against them on the basis of their race, in violation of the Fourteenth Amendment. Id. at 498. The Supreme Court reasoned that although the complaint of the Pullman porters raised a substantial constitutional issue, "[s]uch constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy," i.e. if the Commission's order was invalidated. Id. The Commission had grounded its order on a Texas statute that conferred authority on the Railroad Commission

to adopt necessary regulations "to correct abuses and prevent unjust discrimination in the rates, charges and tolls of the railroads, persons, associations and corporations." Id. at 499. The Court found that whether arrangements pertaining to the staffs of Pullman cars are covered by the Texas statute's concept of "discrimination" was unclear, as was the question of what practices of the railroads may be deemed to be "abuses" subject to the Commission's correction. Id. Noting that it is appropriate for federal courts to exercise "wise discretion" in restraining their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary, Pullman concluded that the law of Texas furnished an easy and ample means for determining the Commission's authority, and that the "last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the supreme court of Texas." Id. at 500-01. Thus, under the Pullman doctrine federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided, thereby avoiding both unnecessary adjudication of federal questions and needless friction with state policies. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984). "However, federal courts need not abstain on Pullman grounds when a state statute is not 'fairly subject to an interpretation which will render unnecessary' adjudication of the federal constitutional question." Id. (citation omitted). "Thus, Pullman abstention is appropriate only when a state law is susceptible to an interpretation that will make it unnecessary to decide the federal constitutional question." See also United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588, 594 (2d Cir. 1989).

The Second Circuit has urged hesitancy in invoking the Pullman doctrine in that the doctrines of abstention are extraordinary and narrow exceptions to the unflagging duty of district courts to adjudicate controversies properly within

federal jurisdiction. United Fence & Guard Rail, 878 F.2d at 593. See also Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir. 1995) (holding that, as a policy matter, district courts should abstain from hearing cases only under very unusual or exceptional circumstances). Three criteria must be established in order to justify abstention on Pullman grounds: (1) an unclear state statute or uncertain state law issue; (2) determination of the federal issue must depend upon the interpretation given to the ambiguous state provision; and (3) the state law must be susceptible of an interpretation that would avoid or modify the federal constitutional issue. United Fence & Guard Rail, 878 F.2d at 594.

Defendants contend, and plaintiff disputes, that should a Connecticut state court decide that the fees at issue are permissible under the Connecticut ATM statutes, there will be no need to reach whether the Connecticut statutes are preempted by the National Bank Act, and thus the state statutes would be "susceptible to an interpretation that would avoid the federal constitutional issue." (Defs.' Mem. at 13). Although the Second Circuit has held that concerns for maintaining federal respect for state law and policy are not implicated when Supremacy Clause questions are presented because such questions are essentially ones of federal policy, and therefore, abstention is not appropriately invoked in a preemption case, see In re Pan American Corp., 950 F.2d 839, 847 (2d Cir. 1991), the defendants maintain that this principle has been "effectively overruled" by the Supreme Court in New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) ("NOPSI"). The court disagrees that NOPSI should be read so broadly.

In NOPSI, the courts below found abstention proper on the basis of both Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Younger v. Harris, 401 U.S. 37 (1971). The Supreme Court, however, held that abstention was inappropriate because the proceeding at issue, the New

Orleans City Council proceeding was not "judicial in nature," but "plainly legislative." NOPSI, 491 U.S. at 370-71. NOPSI confirmed that federal jurisdiction is not compelled solely by the assertion of a substantial claim that the challenged state action is completely preempted by federal law but assumed without deciding that a facially conclusive preemption claim could be sufficient to render abstention inappropriate. NOPSI at 367. Because plaintiff's preemption claim is not facially conclusive, defendants urge that NOPSI's reasoning should be applied to Pullman abstention doctrine. However, the rationale of NOPSI, in holding that a claim of federal preemption is not sufficient to retain jurisdiction where Younger would otherwise require abstention, has no application where no parallel on-going state proceeding exists in which the preemption issue can be raised. Relegating plaintiff's preemption claim to state determination would thus be futile. Further, it would also be potentially futile to abstain to await the state supreme court's interpretation of a state statute which may in fact prove to be preempted by federal law and therefore unenforceable. See also 17A Charles Alan Wright, et al., Federal Practice & Procedure § 4242, at 34 (2d ed. 1988).

Plaintiff claims that the National Bank Act, 12 U.S.C. § 24 (Seventh), preempts the Connecticut ATM statutes. That section provides in pertinent part:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power --
>
> **Seventh**. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and

> negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of title 62 of the Revised Statutes.

"Whenever the federal government has the authority to regulate a given area, Congress may exercise that power so as to preclude states from asserting authority over the same subject matter." Association of Int'l Auto. Mfrs., Inc. v. Abrams, 84 F.3d 602, 607 (2d Cir. 1996). The Supremacy Clause, U.S. Const., art. VI, cl. 2, invalidates state laws that interfere with, or are contrary to, federal law. Id. While express preemption occurs where a federal statute expressly directs that state law be ousted to some degree from a certain field, even when there is no express statutory statement, there may be implied preemption. Id. A federal statute implicitly overrides state law when either the scope of the statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. Id. Further, implied conflict preemption may be found where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Id. Here, if § 24 (Seventh) of the National Bank Act is ultimately found either to occupy the field exclusively, or to conflict actually or implicitly with the Connecticut ATM statutes, then the National Bank Act will preempt state law, regardless of any state court interpretations of those statutes. In short, interpretation of the Connecticut ATM statutes by a Connecticut court in the first instance will not resolve the preemption question in this case.

Finally, the gravamen of defendants' claim is that the issue of the propriety of charging ATM fees directly to non-

depositors under the Connecticut ATM statutes is untested and has never been addressed by the Connecticut courts. However, the first prong of the Pullman doctrine--that the state statute be unclear or uncertain--is not synonymous with the fact that a state statute has not yet been interpreted. Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir. 1995) (citing Wisconsin v. Constantineau, 400 U.S. 433 (1971)) (state law is not rendered unclear merely because no state court has yet construed it). Defendants here have not demonstrated a lack of statutory clarity that would compel the court to abstain. See United Fence & Guard Rail, 878 F.2d at 595 (mere complexity of a state law issue is insufficient reason to invoke the Pullman doctrine).

There is little, if any, discretion to abstain in a case which does not meet the requirements of a particular abstention principle. Steinhaus, 60 F.3d at 126. Therefore, because defendants do not make a sufficient showing that the state ATM statutes are unclear, and plaintiff's preemption claim does not present a federal constitutional issue which would be avoided by allowing the state courts to resolve any unsettled state law question regarding the Connecticut ATM statutes, the court concludes that abstention is not required under the Pullman doctrine.

Accordingly, defendant's Motion to Dismiss [doc. #8] is DENIED.

IT IS SO ORDERED.

_____

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut: August 11, 1997.

12 U.S.C. § 24 (Seventh)

§ 24. Corporate Powers of Associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power--

. . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. . .

. . .

12 U.S.C. § 36(f)

§ 36. Branch Banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

. . .

(f) Law applicable to interstate branching operations

(1) Law applicable to national bank branches

(A) In general

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except --

(i) when Federal law preempts the application of such State laws to a national bank; or

(ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.

(B) Enforcement of applicable State laws

The provisions of any State laws to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.

(C) Review and report on actions by Comptroller

The Comptroller of the Currency shall conduct an annual review of the actions it has taken with regard to the applicability of State law to national banks (or their branches) during the preceding year, and shall include in its annual report required under section 333 of the Revised Statutes (12 U.S.C. 14) the results of the review and the reasons for each such action. The first such review and report after July 3, 1997 shall encompass all such actions taken on or after January 1, 1992.

(2) Treatment of branch as bank

All laws of a host State, other than the laws regarding community reinvestment, consumer protection, fair lending, establishment of intrastate branches, and the application or administration of any tax or method of taxation, shall apply to a branch (in such State) of an out-of-State national bank to the same extent as such laws would apply if the branch were a national bank the main office of which is in such State.

(3) Rule of construction

No provision of this subsection may be construed as affecting the legal standards for preemption of the application of State law to national banks.

. . .

12 U.S.C. § 484(a)

§ 484. Limitation on Visitorial Powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

. . .

12 U.S.C. § 1818(b)

§ 1818. Termination of Status As Insured Depository Institution

. . .

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaged or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any

such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841 et seq.], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C.A. § 611 et seq.] or operating under section 25 of the Federal Reserve Act [12 U.S.C.A. § 601 et seq.], in the same manner as they apply to a State member insured depository institution. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any foreign bank or company to which subsection (a) of section

3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under paragraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841].

(5) This section shall apply, in the same manner as it applies to any insured depository institution for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(6) Affirmative action to correct conditions resulting from violations or practices

The authority to issue an order under this sub section and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to--

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if--

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

(7) Authority to limit activities

The authority to issue an order under this subsection or subsection (c) of this section includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(8) Unsatisfactory asset quality, management, earnings, or liquidity as unsafe or unsound practice.

If an insured depository institution receives, in its most recent report of examination, a less-than-satisfactory rating for asset quality, management, earnings, or liquidity, the appropriate Federal banking agency may (if the deficiency is not corrected) deem the institution to be engaging in an unsafe or unsound practice for purposes of this subsection.

(9) Expansion of authority to savings and loan affiliates and entities.

Subsections (a) through (s) and subsection (u) of this section shall apply to any savings and loan holding company and to any subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, whether wholly or partly owned, in the same manner as such subsections apply to a savings association.

(10) Standard for certain orders

No authority under this subsection or subsection (c) of this section to prohibit any institution-affiliated party from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property may be exercised unless the appropriate Federal banking agency meets the standards of Rule 65 of the Federal Rules of Civil Procedure, without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

. . .

12 U.S.C. § 1818h(2)

(h) Hearings and Judicial Review

. . .

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

28 U.S.C. § 1331

§ 1331. Federal question

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1367

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

12 C.F.R. § 205.9(a)(1) (1999)

§ 205.9 Receipts at electronic terminals; periodic statements

(a) Receipts at electronic terminals. A financial institution shall make a receipt available to a consumer at the time the consumer initiates an electronic fund transfer at an electronic terminal. The receipt shall set forth the following information, as applicable:

(1) Amount. The amount of the transfer. A transaction fee may be included in this amount, provided the amount of the fee is disclosed on the receipt and displayed on or at the terminal.

. . .

12 C.F.R. § 7.1019 (1998)

§ 7.1019 Furnishing of products and services by electronic means and facilities.

A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver. A national bank may also, in order to optimize the use of the bank's resources, market and sell to third parties electronic capacities acquired or developed by the bank in good faith for banking purposes.

12 C.F.R. § 7.4002 (1998)

§ 7.4002 National bank charges.

(a) Customer charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges. For example, a national bank may impose deposit account service charges that its board of directors determines to be reasonable on dormant accounts. A national bank may also charge a borrower reasonable fees for credit reports or investigations with respect to a borrower's credit. All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(b) Considerations. The establishment of noninterest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others:

(1) The cost incurred by the bank, plus a profit margin, in providing the service;

(2) The deterrence of misuse by customers of banking services;

(3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and

(4) The maintenance of the safety and soundness of the institution.

(c) Interest. Charges and fees that are "interest" within the meaning of 12 U.S.C. 85 are governed by § 7.4001 and not by this section.

(d) State law. The OCC evaluates on a case-by-case basis whether a national bank may establish non-interest

charges or fees pursuant to paragraphs (a) and (b) of this section notwithstanding a contrary state law that purports to limit or prohibit such charges or fees. In issuing an opinion on whether such state laws are preempted, the OCC applies preemption principles derived from the Supremacy Clause of the United States Constitution and applicable judicial precedent.

(e) National bank as fiduciary. This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 CFR part 9.

Conn Gen. Stat. § 36a-50 (1997)

§ 36a-50. Enforcement action. Notice and hearing. Civil penalty. Injunction, restraining order and writ. Restitution. Costs

(a)(1) Whenever the commissioner finds as the result of an investigation that any person has violated any provision of the general statutes within the jurisdiction of the commissioner, or any regulation, rule or order adopted or issued thereunder, the commissioner may send a notice to such person by registered or certified mail, return receipt requested. The notice shall be deemed received by the person on the earlier of the date of actual receipt or seven days after mailing. Any such notice shall include: (A) A statement of the time, place, and nature of the hearing; (B) a statement of the legal authority and jurisdiction under which the hearing is to be held; (C) a reference to the particular sections of the general statutes, regulations, rules or orders alleged to have been violated; (D) a short and plain statement of the matters asserted; (E) the maximum penalty that may be imposed for such violation; and (F) a statement indicating that such person may file a written request for a hearing on the matters asserted within fourteen days of receipt of the notice.

(2) If a hearing is requested within the time specified in the notice, the commissioner shall hold a hearing upon the matters asserted in the notice unless such person fails to appear at the hearing. After the hearing, if the commissioner finds that the person has violated any such provision, regulation, rule or order, the commissioner may, in the commissioner's discretion and in addition to any other remedy authorized by law, order that a civil penalty not exceeding seven thousand five hundred dollars per violation be imposed upon such person. If such person does not request a hearing within the time specified in the notice or fails to appear at the hearing, the commissioner may, as the

facts require, order that a civil penalty not exceeding seven thousand five hundred dollars per violation be imposed upon such person.

(3) Each action undertaken by the commissioner under this subsection shall be in accordance with the provisions of chapter 54.

(b) Whenever it appears to the commissioner that any such person has violated, is violating or is about to violate any such provision, regulation, rule or order, the commissioner may, in the commissioner's discretion and in addition to any other remedy authorized by law; (1) Bring an action in the superior court for the judicial district of Hartford-New Britain to enjoin the acts or practices and to enforce compliance with any such provision, regulation, rule or order. Upon a proper showing, a permanent or temporary injunction, restraining order or writ of mandamus shall be granted and a receiver or conservator may be appointed for such person or such person's assets. The court shall not require the commissioner to post a bond; (2) seek a court order imposing a penalty not to exceed seven thousand five hundred dollars per violation against any such person found to have violated any order issued by the commissioner; or (3) apply to the superior court for the judicial district of Hartford-New Britain for an order of restitution whereby such person shall be ordered to make restitution of any sums shown by the commissioner to have been obtained by such person in violation of any such provision, regulation, rule or order, plus interest at the rate set forth in section 37-3a. Such restitution shall, at the option of the court, be payable to the receiver or conservator appointed pursuant to this subsection, or directly to the person whose assets were obtained in violation of any such provision, regulation, rule or order. Whenever the commissioner prevails in any action brought under this subsection, the court may allow to the state its costs.

Conn. Gen. Stat. 36a-156 (1997)

§ 36a-156. Availability of machines, devices and terminals for use by other banks and credit unions

(a) One or more banks, Connecticut credit unions or federal credit unions which have established a satellite device or point of sale terminal shall make the satellite device or point of sale terminal available on a nondiscriminatory basis for use by any other bank, Connecticut credit union or federal credit union, upon payment by each such other bank or credit union of a reasonably proportionate share of all acquisition, installation and operating costs of the satellite device or point of sale terminal. The satellite device or point of sale terminal shall identify with equal prominence all of the banks, credit unions or network systems which use the satellite device or point of sale terminal.

(b) Any bank, Connecticut credit union or credit union which has established an automated teller machine which is not a satellite device may, in its discretion, permit any other bank, Connecticut credit union or federal credit union to use such automated teller machine, provided, (1) if such permission is granted to any other bank, Connecticut credit union or federal credit union, the automated teller machine is made available on a nondiscriminatory basis for use by any other bank, Connecticut credit union or federal credit union, upon payment of reasonably proportionate costs as described under subsection (a) of this section, and (2) such use is otherwise in accordance with subsection (a) of this section.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION	:	NO.
Plaintiff,	:	**397CT00183 JBA**
v.	:	
THE HONORABLE JOHN P. BURKE, Banking Commissioner of the State of Connecticut; THE CONNECTICUT DEPARTMENT OF BANKING, a State Agency,	:	
Defendants.	:	JANUARY 22, 1997

COMPLAINT

Parties

1. Plaintiff, Fleet Bank, National Association ("Fleet") is a national banking association organized and existing under the National Bank Act, 12 U.S.C. § 21 et seq.

2. Fleet maintains its main office and principal place of business in Springfield, Massachusetts and engages in the business of banking, among other places, throughout the State of Connecticut.

3. Defendant John P. Burke is the Banking Commissioner of the State of Connecticut.

4. Defendant Connecticut Department of Banking is an agency of the State of Connecticut established pursuant to Connecticut General Statutes ("C.G.S.") § 4-38c.

Jurisdiction and Venue

5. This is an action for declaratory relief under 28 U.S.C. § 2201 and for injunctive relief.

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States.

7. Venue is proper in this Court under 28 U.S. C. § 1391(b), as this is the judicial district in which the defendants reside.

Statement of Facts

8. An electronic device that is useful and significant to the business of national banks and others is known as the Automatic Teller Machine ("ATM").

9. In C.G.S. § 36a-2, Connecticut defines an ATM as "a stationary or mobile unattended device, including a satellite device but excluding a point of sale terminal, at which banking transactions, including, but not limited to deposits, withdrawals, advances, payments or transfers, may be conducted . . . ." This statute defines a "satellite device" in relevant part as "an automatic teller machine which is not part of an office of the bank. . . which has established such machine . . . ."

10. As a national bank, Fleet is a federal instrumentality. Pursuant to 12 U.S.C. § 24 (Seventh), Fleet

is invested with "all such incidental powers as shall be necessary to carry on the business of banking." Among other incidental powers, a national bank may establish and maintain ATMs. Additionally, a national bank may charge its customers, including customers who are not depositors ("non-depositor customers"), various charges and fees for banking services, subject to the regulatory oversight of the Office of the Comptroller of the Currency. This incidental power under 12 U.S.C. § 24 (Seventh) includes the authority to charge fees to customers for the use a national bank's ATMs.

11. At significant expense and in order to facilitate its business as a national bank, Fleet establishes and maintains ATMs, including satellite devices, at numerous locations throughout the State of Connecticut and elsewhere. In connection with this banking service, Fleet has established fees for the use of its ATMs by its non-depositor customers. As described below, the defendants oppose the imposition of these fees in Connecticut.

12. The Connecticut ATM statutes, C.G.S. § 36a-155 et seq., govern the establishment and use of ATMs by state banks in Connecticut and, to the extent that they do not conflict with federal law, national banks operating ATMs in this state.

13. The Connecticut ATM statutes authorize a state-chartered or federal-chartered bank to establish ATMs ("establishing bank") at either the bank's main office or branch office, or satellite devices at any other location. For an ATM located at an office of the establishing bank, the bank may limit the device's use to its depositors only or it may make it available on a nondiscriminatory basis for use by any other bank, upon payment of a reasonably proportionate share of all acquisition, installation, and operating costs. In the case of satellite device, the establishing bank must make it available on a non-

discriminatory basis to any other bank, upon payment of a reasonably proportionate share of these costs.

14. The Connecticut ATM statutes do not expressly prohibit establishing banks from charging fees to customers, including non-depositor customers, who use their ATMs.

15. The defendants nevertheless take the position that the only permissible ways in which fees may be charged under the Connecticut ATM statutes are as follows:

(a) a bank, pursuant to the terms of its depositor agreement, may charge fees for ATM use to its depositors; and

(b) an establishing bank which makes its ATM available to be used on a nondiscriminatory basis by any other bank may require payment by such other banks of a reasonably proportionate share of all acquisition, installation, and operating costs of the ATM.

16. The defendants have interpreted the Connecticut ATM statutes to prohibit establishing banks, including Fleet and other national banks, from charging fees to non-depositor customers who use their ATMs.

17. Upon information and belief, defendants intend to use their powers under state law to prevent or impede Fleet's exercise of its incidental powers to charge fees to non-depositor customers using its ATMs.

18. The defendants have adopted an arbitrary, capricious, and erroneous view of the Connecticut ATM statutes insofar as they conclude that these statutes prohibit Fleet from charging fees to non-depositor customers using its ATMs.

19. Under the Supremacy Clause of the United States Constitution Article VI, Section 2, the Connecticut ATM statutes are preempted by 12 U.S.C. § 24 (Seventh) to the extent that these statutes are interpreted to prohibit Fleet from, or penalize Fleet for, exercising the power to charge fees to non-depositor customers using its ATMs.

20. There is a justiciable controversy between the plaintiff and the defendants over whether the defendants have correctly interpreted the Connecticut ATM statutes and, if so, whether these statutes are preempted by federal banking law.

21. The defendants' actions and threatened actions in prohibiting Fleet from charging these fees contravene state and federal law. Furthermore, these actions and threatened actions adversely affect Fleet's ability to conduct its banking business pursuant to the National Bank Act. Unless the defendants are enjoined from taking such actions, Fleet will be irreparably harmed.

22. Fleet has no adequate remedy at law under which it may obtain redress for the harm caused by defendants' actions.

Prayer For Relief

WHEREFORE, Fleet request that judgment be entered in this action:

1. declaring that the Connecticut ATM statutes do not prohibit Fleet from exercising the power to charge fees to non-depositor customers using its ATMs;

2. declaring that the National Bank Act conflicts with and preempts the Connecticut ATM statutes insofar as they are interpreted to prohibit or impede Fleet from charging fees to non-depositor customers using its ATMs;

3. permanently enjoining defendants from acting in any way to prevent, impede, or interfere with Fleet from charging fees to non-depositor customers using its ATMs; and

4. granting such other and further relief as this Court may deem just and proper.

PLAINTIFF, FLEET BANK, NATIONAL ASSOCIATION

By_____

Daniel L. FitzMaurice
Fed. Bar No. CT 05331
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(860) 275-0100

Its Attorneys

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION *Plaintiff* v. THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT, THE CONNECTICUT DEPARTMENT OF BANKING, *Defendant*	CIVIL ACTION NO. 397CV00133 (JBA) FEBRUARY 26, 1997

ANSWER

The defendants herewith answer the Complaint as follows:

1. The allegations in paragraphs 2, 3, 4, 5, 7, 15, and 16 are admitted.

2. The allegations in paragraph 6, 14, 17, 18, 19, 20, 21 and 22 are denied.

3. With respect to the allegations in paragraphs 1 and 8 the defendants have insufficient knowledge on which to form a belief and therefore leave the plaintiff to its proof at trial.

4. With respect to the allegations in paragraphs 9, the defendants admit the existence of Conn. Gen. Stat. § 36a-2. This statutory provision speaks for itself.

5. With respect to the allegations in paragraph 10, the defendants admit the existence of 12 U.S.C. § 24 which speaks for itself. All other allegations contained in this paragraph constitute legal analysis and interpretation and therefore do not constitute fact pleading.

6. With respect to the allegations in paragraph 11, the defendants admit that the plaintiff "establishes and maintains ATMs, including satellite devices, at numerous locations throughout the State of Connecticut and elsewhere" and that the defendants oppose the imposition of fees on a bank's nondepositor customers for use of the bank's ATM. As to the remainder of this paragraph, the defendants do not have sufficient knowledge on which to form a belief and therefore leave the plaintiff to its proof at trial.

7. With respect to the allegations in paragraph 12, the defendants admit the existence of Conn. Gen. Stat. § 36a-155 et seq. which speak for themselves; the defendants deny the remainder of this paragraph.

8. The defendants admit the existence of Conn. Gen. Stat. § 36a-155, but as to the allegations of paragraph 13 which purport to interpret said § 36a-155, said allegations are denied as they constitute legal argument and the said statutory provision speaks for itself.

FIRST SPECIAL DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND SPECIAL DEFENSE

This Court lacks jurisdiction over the subject matter of the Complaint and must abstain from interpreting Conn. Gen. Stat. § 36a-155 which has not been construed by any Connecticut state court.

DEFENDANTS

RICHARD BLUMENTHAL
ATTORNEY GENERAL

By _____

John G. Haines
Assistant Attorney General
Federal Bar No. ct08316

_____

William J. Prensky
Assistant Attorney General
Federal Bar No. ct08643
110 Sherman Street
Hartford, CT 06141-0120
Tel.: (860) 566-4899

CERTIFICATION

I hereby certify that a copy hereof was mailed this date, first class postage prepaid, to Daniel L. FitzMaurice, Esq., Day, Berry & Howard, CityPlace, Hartford, Connecticut 06103-3499.

_____

William J. Prensky
Commissioner of the Superior Court

UNITED STATE DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK :

v. : NO. 397cv133 (JBA)

BURKE, et al. :

SCHEDULING ORDER

Dated at New Haven, Connecticut: August 29, 1997

Based on the agreements of counsel on the record of 08/29/97, the following schedule will be followed:

1. No later than October 29, 1997 the parties will file simultaneously:

   a) Stipulations of Fact;
   b) Cross-Motions for Summary Judgment on State Law;
   c) Memoranda in Support;
   d) Memoranda in Opposition; and
   e) Reply Memoranda.

2. The preemption issue is bifurcated and will be addressed by later scheduling orders, if necessary.

IT IS SO ORDERED.

_____

Janet Bond Arterton
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION,	:	CIVIL ACTION NO. 397 CV00133 (JBA)
V.	:	
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT; THE CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY	:	
Defendants.	:	October 29, 1997

PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

Plaintiff Fleet Bank, N.A. ("Fleet") hereby moves this Court for Summary Judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. In support of its motion, Fleet respectfully refers the Court to the accompanying Memorandum of Law, the Plaintiff's Statement of Material Facts as to which There Is No Genuine Issue to be Tried, the Affidavit of Eric Hannelius in Support of Motion for Summary Judgment, and the parties' Joint Stipulation of Facts regarding Cross-Motions for Summary Judgment.

Based upon the undisputed, material facts, plaintiff respectfully requests that judgment enter declaring that the

Connecticut law does not prohibit Fleet from exercising the power to charge fees to non-depositor customers for the use of its ATMs. (*See* Complaint, at 8 (Prayer for Relief).)

Respectfully submitted,

PLAINTIFF,
FLEET BANK, NATIONAL ASSOCIATION

By_____

Daniel L. FitzMaurice ct 05331
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing was mailed this date, postage prepaid, to:

Assistant Attorney General William Prensky
110 Sherman Street
Hartford, Connecticut 06105

_____
Daniel L. FitzMaurice

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION	:	CIVIL ACTION
Plaintiff	:	NO. 3:97CV0001333(JBA)
v.	:	
THE HON. JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT; THE STATE OF CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY	:	
Defendants	:	OCTOBER 14, 1997

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 9(c), the Defendants in the above-captioned action hereby move the Court to enter Summary Judgment in their favor because there exists no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law with respect to the interpretation of the Connecticut ATM law, Conn. Gen. Stat. § 36a-156.

DEFENDANTS,
JOHN P. BURKE, BANKING
COMMISSIONER; and
DEPARTMENT OF BANKING

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BY:_____

William J. Prensky
Assistant Attorney General
Federal Bar No. ct85294
110 Sherman Street
Hartford, CT 06105
Tel. (860) 566-4899
THEIR ATTORNEY

CERTIFICATION

I hereby certify that a copy of the foregoing Defendants' Motion for Summary Judgment was mailed in accordance with Rule 5(b) of the Federal Rules of Civil Procedure, on this 14th day of October, 1997, to:

Daniel L. FitzMaurice, Esq.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499

_____
William J. Prensky
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION,	:	CIVIL ACTION NO. 397 CV00133 (JBA)
v.	:	
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT; THE CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY	:	
Defendants	:	

JOINT STIPULATION OF FACTS REGARDING CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(c) of the Local Rules of Civil Procedure, the parties stipulate and agree that there is no genuine issue with regard to the following Statement of Material Facts.

1. The plaintiff in this action, Fleet Bank, National Association ("Fleet"), is a national banking

association organized and existing under the National Bank Act, 12 U.S.C. § 21 et seq., with branches in the State of Connecticut.

2. The defendants are, respectively, John P. Burke, the Banking Commissioner of the State of Connecticut ("Commissioner"); and the Connecticut Department of Banking ("Banking Department"), an agency of the State of Connecticut established pursuant to Connecticut General Statutes § 4-38c. The Commissioner is charged, in part, with the general administration and implementation of the Banking Law of Connecticut, Title 36a of the Connecticut General Statutes, §§ 36a-l to 36a-8l0, inclusive.

3. Fleet establishes and maintains electronic devices known as automated teller machines ("ATMs"). Connecticut law defines an ATM as "a stationary or mobile unattended device, including a satellite device but excluding a point of sale terminal, at which banking transactions, including but not limited to, deposits, withdrawals, advances, payments or transfers, may be conducted." Connecticut law defines a satellite device as "an automated teller machine which is not part of an office of the bank, Connecticut credit union or federal credit union which has established such machine." A transaction at an ATM is effectuated by use of a plastic key card or ATM card issued by an account holder's bank ("card-issuing bank"). An ATM card permits cardholder to access his or her deposit accounts, allowing, among other things, a withdrawal of cash, transfer of funds between accounts, or statement of an account balance.

4. Fleet is currently a member of three ATM networks: CIRRUS, PLUS, and NYCE. Through shared ATM networks, banks subscribe to one set of rules governing the entire membership of banks in the network so that the banks need not contract separately with each other for use of their respective ATMs. These networks allow

Fleet to process transactions for non-depositors who hold ATM cards issued by other card-issuing banks. Under ATM network agreements, member banks that maintain ATMs ("establishing banks") receive certain fees, on set schedules, from card-issuing banks ("interchange fees") for transactions performed for non-depositor customers ("foreign transactions").

5. The parties stipulate to the admissibility of Exhibit A to this Joint Stipulation, which is an opinion letter from the then Banking Commissioner of the State of Connecticut, and which is the most recent opinion on the subject contained therein. A true and accurate copy of the Commissioner's opinion is attached as Exhibit A.

6. Card-issuing banks may charge their depositors a fee that equals or exceeds the interchange fee they pay for the depositors' foreign transactions. Alternatively, a card-issuing bank may choose not to impose such charges.

7. In the past few years, a number of national banks and other banks have imposed user fees upon non-depositors for the use of their ATMs ("surcharges"). Each of the ATM networks to which Fleet belongs allows establishing banks to impose surcharges. These surcharges are apart from any charge that the non-depository customer may have to pay to his or her card-issuing bank with respect to the interchange fee on foreign transactions. Thus, a customer may have to pay two charges for using another bank's ATM: 1). a surcharge imposed directly by the establishing bank; and 2). depending upon the terms of the customer's depository agreement, a fee which may be imposed by the card-issuing bank.

8. Before it initiated this lawsuit, Fleet made a business determination to impose surcharges on non-depositor customers for the use of its ATM services. Fleet

now imposes surcharges in several locations outside of Connecticut. Nationally, surcharges generally range from $.50 to $3.00 per transaction. Some ATM owners have charged as much as $10 per transaction as a "convenience fee." According to a national survey as of February 20, 1997, the most common surcharge amount is $1.00 per transaction, and the average surcharge amount is $1.32 per transaction.

9. Fleet presently operates a total of 365 ATMs in Connecticut of which 155 are satellite devices. Pending the outcome of this lawsuit, Fleet has not imposed surcharges on ATM transactions in Connecticut because the Banking Commissioner has interpreted the Connecticut ATM statutes to prohibit such fees. Fleet, however, disagrees with this interpretation of the Connecticut ATM statutes.

10. On September 14, 1995, Attorney Robert M. Taylor, III, sought an opinion or interpretation from the Commissioner as to whether the Connecticut General Statutes relating to ATMs, Conn. Gen. Stat. § 36a-155 et seq. (the "Connecticut ATM Statutes"), permit or prohibit a federally chartered bank to impose surcharges upon non-depositors for the use of its ATMs. In response, the Commissioner opined that surcharges are not permissible. A true and accurate copy of the Commissioner's opinion is appended to this Joint Stipulation as Exhibit B. The parties hereby stipulate to the admissibility of this Exhibit B.

PLAINTIFF,
FLEET BANK, N.A.,

By_____
Daniel L. FitzMaurice
Fed. Bar No. ct 05331
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(860) 275-0100

DEFENDANTS,
THE HONORABLE JOHN P. BURKE,
BANKING COMMISSIONER, STATE OF
CONNECTICUT, THE CONNECTICUT
DEPARTMENT OF BANKING

RICHARD BLUMENTHAL
ATTORNEY GENERAL

By: _____
William J. Prensky
Fed. Bar No. ct 08643
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105
(860) 566-4899

STATE OF CONNECTICUT
DEPARTMENT OF BANKING
260 CONSTITUTION PLAZA
HARTFORD, CT 06103

September 14, 1995

John P. Burke
Commissioner

Robert M. Taylor, III, Esq.
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499

Dear Mr. Taylor:

This is in response to your letter dated August 1, 1995, concerning the permissibility of certain automated teller machine ("ATM") transaction fees. Specifically, you seek confirmation of your Interpretation that a state-chartered bank permissibly may charge a direct transaction fee for the use of such bank's ATM by a person who does not otherwise maintain a banking relationship with the bank. The imposition of such transaction fees would permit a bank to recoup a portion of the expenses incurred by the bank to establish and maintain the ATM. You also seek the concurrence of this department that the Connecticut statutes governing the use of ATMs in Connecticut would not place any restriction on the ability of a federally-chartered bank in Connecticut to impose similar fees, provided it was authorized to do so under federal law. You state that any such transaction fees to be imposed would be disclosed to the user of the ATM either on a sign posted on the ATM or in clear view of the customer using the ATM or electronically during the course of the transaction in a

manner that would permit a user to cancel the transaction without incurring the transaction fee.

The Connecticut statutes governing the establishment and use of ATMs do not authorize banks to impose the transaction fees described above. Moreover, Section 36a-156 of the Connecticut General Statutes specifically authorizes a bank that has established an ATM to impose a usage fee on other banks whose customers use the ATM to cover "a reasonably proportionate share of all acquisition, installation and operating costs". It is an established rule of statutory construction that a statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in another way. *See, State ex rel. Barlow v. Kaminsky*, 144 Conn. 612 (1957). Therefore, Section 36a-156, which provides that a bank may charge another bank that uses its ATM a fee for such use, carries with it an implied prohibition against the bank imposing a fee on the customers of the other bank for such use. Accordingly, this department is unable to agree with your interpretation that a state-chartered bank in Connecticut may charge a direct transaction fee for the use of its ATM by the customer of another bank or that the Connecticut statutes governing ATMs would not restrict the ability of federally-chartered banks in Connecticut to impose similar fees. A state-chartered or federally-chartered bank in Connecticut that wishes to recoup the expenses incurred in establishing and maintaining an ATM may do so by imposing the usage fee permitted under Section 36a-156 on other banks whose customers use the ATM.

Very truly yours,

John P. Burke
Banking Commissioner

JPB:td

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, NATIONAL ASSOCIATION,	:	CIVIL ACTION NO.
Plaintiff,	:	397CV00133 (JBA)
vs.	:	
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT; THE CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY	:	
Defendant.	:	OCTOBER 9, 1998

AFFIDAVIT OF ROBERT B. HEDGES, JR.

Robert B. Hedges, Jr., having been first duly sworn, deposes and says:

1. I am over 18 years of age and believe in the obligations of an oath. I submit this affidavit in connection with plaintiff's opposition to defendants' motion for stay pending appeal. I make this affidavit based on my personal knowledge of the facts set forth below.

2. I am a Senior Vice President of Fleet Financial Group, which is the corporate parent of the plaintiff in this action, and the Director of Retail Distribution of Fleet's banking products and services. Among other things, I am responsible for services provided through Fleet's automated teller machines ("ATM").

3. I am aware of this Court's ruling with respect to ATM surcharges in Connecticut. I am also aware that the defendants have appealed this ruling. Fleet is able to and will maintain records which would allow Fleet to transmit payments to customers' banks to facilitate refunds to these customers of surcharges imposed in the event that reimbursement of these charges is later required.

4. If Fleet is not permitted to implement surcharges during the pendency of this appeal, however, I know of no way for Fleet to recover the revenues it will lose. In order to impose a surcharge, Fleet must give a proper notice to the customer at the time of the transaction in accordance with Regulation E of the Code of Federal Regulations, 12 C.F.R. § 205.9(a) (1998). I am not aware of any procedure whereby Fleet can impose surcharges retroactively on non-depositor customers who use Fleet's ATMs.

5. If Fleet is prohibited from imposing surcharges in Connecticut, I estimate that Fleet will be deprived of approximately $15,000 in gross revenues per day to fund the costs of providing these services. This projection is based upon the level of ATM transactions in Connecticut adjusted for our experience in other states in which we have rolled out surcharges. The inability to implement surcharges only in Connecticut would restrict Fleet's ability to deploy additional ATMs in the state and impede its regional ATM strategy.

_____

Robert B. Hedges Jr.

Subscribed and sworn to before me this
4th day of October, 1998.

_____

Notary Public
My Commission Expires:

[Filed Nov. 9 3:55 p.m. '98]
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FLEET BANK, N.A.	:	
	:	CIVIL ACTION NO.
	:	398CV02186 (JCH)
a national bank organized under the laws of the United States	:	
Plaintiff	:	
vs.	:	
THE HONORABLE JOHN P. BURKE, acting in his official capacity as Banking Commissioner of the State of Connecticut	:	
Defendant.	:	NOVEMBER 9, 1998

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Fleet National Bank ("Fleet"), by and through its attorneys, for its complaint against The Honorable John P. Burke, acting in his official capacity as Banking Commissioner of the State of Connecticut (the "Commissioner"), hereby complains and alleges as follows:

NATURE OF ACTION

1. This is an action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 by which Fleet seeks to enforce, and to enjoin the Commissioner from interfering with Fleet's lawful exercise of its rights under the National Bank Act of 1864, 13 Stat. 99, codified at 12 U.S.C. §§21 et seq. (the "Act"). The Act is a landmark piece of legislation, one of the primary purposes of which was to establish a framework for the creation and regulation of national banks.

2. National banks derive their corporate powers from the Act, specifically 12 U.S.C. §24. Section 24(Seventh) contains a sweeping grant of authority pursuant to which national banks may exercise "all such incidental powers as shall be necessary to carry on the business of banking."

3. Under Section 24(Seventh), a national bank has the authority to maintain automated teller machines ("ATMs") and to charge persons using those ATMs for the services thereby provided. Fleet charges non-depositors of Fleet a convenience fee when they use an ATM maintained by Fleet. The Commissioner has, however, purported to declare Fleet's levying of such charges as unlawful and violative of Connecticut law. Fleet, therefore, brings this claim under 13 U.S.C. §24(Seventh) of the Act and 42 U.S.C. §1983 to establish and vindicate its federal statutory rights and to prevent the Commissioner from unlawfully interfering with such rights.

4. Any effort by the Commissioner to interfere with Fleet's efforts to levy and collect non-depositor ATM charges will, if permitted to occur, have the effect of denying Fleet the rights specifically afforded it under federal law and regulations. Fleet will be and is being harmed by the Commissioner's actions in that it is unable to freely

exercise its federal statutory rights without threat of substantial and costly interference by such defendant.

JURISDICTION

5. Jurisdiction is proper pursuant to 28 U.S.C. §§1331 and 1337. This case arises under the laws of the United States including, in particular, the National Bank Act 12 U.S.C. §§21, et seq., and 42 U.S.C. §1983. In addition, Fleet seeks declaratory relief pursuant to 28 U.S.C. §§2201 and 2202 in that it seeks to enjoin the Commissioner, as well as all persons acting in concert with him or pursuant to his direction from acting to interfere with Fleet's rights as afforded by the Act. Furthermore, this case also raises a federal question with respect to the exclusive enforcement authority of the Comptroller of the Currency pursuant to 12 U.S.C. § 1818 (b)(1).

VENUE

6. Venue in this District is proper under 28 U.S.C. §1391(b). The Commissioner is a resident of Connecticut. Additionally, since all activities undertaken by the Commissioner thus far, as well as any actions which he may undertake in the future, have or will primarily occur in this district, the events giving rise to the dispute can be said to have occurred herein.

PARTIES

7. Fleet is a national banking association organized under and subject to the laws of the United States.

8. The Commissioner is a resident of the State of Connecticut.

SUBSTANTIVE ALLEGATIONS

9. ATMs are electronic devices that are useful to national banks in providing customary banking services. Among other things, they permit persons to make deposits and withdrawals, to check balances, and to transfer funds.

10. Conn. Gen. Stat. ("C.G.S.") §36a-2 defines an ATM as "a stationary or mobile unattended device, including a satellite device but excluding a point of sale terminal at which banking transactions, including, but not limited to, deposits, withdrawals, advances, payments or transfers, may be conducted. . .." Section 36a-2 also defines a "satellite device" in relevant part as "an automated teller machine which is not part of an office of the bank . . . which has established such machine . . .."

11. As a national bank, Fleet is a federal instrumentality, and the Office of the Comptroller of the Currency ("OCC") acts as Fleet's primary federal regulator. Insofar as the Commissioner asserts that Fleet has violated any law, primary and exclusive jurisdiction over such a claim, and the right to issue any cease and desist order, rests with the OCC pursuant to 12 U.S.C. § 1818(b)(1)

12. Pursuant to 12 U.S.C. §24(Seventh), Fleet is invested with "all such incidental powers as shall be necessary to carry on the business of banking." These incidental powers include the right to establish and maintain ATMs, and the right to charge customers including those customers who are not depositors of Fleet ("Non-depositor customers"), a convenience fee for their use of such ATMs.

13. At significant expense and in order to facilitate its business as a national bank, Fleet has established and maintains ATMs, including satellite devices, at numerous locations throughout the State of Connecticut. In connection with this banking service. Fleet has established

fees for the use of its ATMs by its non-depositor customers and, as described below, has been levying such charges in Connecticut since October 23, 1998.

14. As more particularly described below, the Commissioner opposes the imposition of non-depositor customer ATM fees in Connecticut and has publicly (and privately) stated his intention to utilize his official position to prevent Fleet from continuing to levy and collect such fees.

15. Connecticut's ATM statutes, C.G.S. §§36a-159, govern the establishment and use of ATMs by state banks in Connecticut and, to the extent that such statutes do not conflict with federal law, by national banks operating ATMs in this state.

16. Connecticut's statutory scheme authorizes a state or federally chartered bank (the "Establishing Bank") to establish ATMs at either the main or branch offices of the bank or satellite devices at any other location.

17. Pursuant to C.G.S. §36a-156, for an ATM located at an office of the Establishing Bank, the Establishing Bank may limit the device's use to its own depositors. Alternatively, the Establishing Bank may make the device available on a non-discriminatory basis for use by any other bank upon payment by such other bank of a reasonably proportionate share of all acquisition, installation, and operating costs associated with such device. In contrast, and again pursuant to C.G.S. §36a-156, in the case of a satellite device, the Establishing Bank must make the device available on a non-discriminatory basis to any other bank upon payment by such bank of a reasonably proportionate share of all acquisition, installation and operating costs.

18. On September 14, 1995, the Commissioner wrote a letter opining that C.G.S. §36a-156 impliedly

prohibits national banks from charging non-depositor customers for ATM use.

19. Fleet brought an action on January 22, 1997 in this court, viz. Fleet Bank, National Association v. Burke, et al., Dkt No. 97cv00133(JBA) (the "Fleet I Action"), seeking a declaratory judgment that the National Bank Act, 12 U.S.C. §24(Seventh), preempted Connecticut law insofar as it prohibited Fleet from charging non-depositor customers for ATM use.

20. Fleet alleged that federal question jurisdiction existed because Fleet's right to establish ATMs and to charge for their use pursuant to the National Bank Act, 12 U.S.C. §24(Seventh), preempted application of Connecticut's ATM statutes pursuant to the Supremacy Clause.

21. On September 30, 1998, this court (Arterton, J.) issued a decision (the "Decision") holding that Section 36a-156 neither expressly nor impliedly prohibits non-depositor customer ATM charges. The Decision did not address Fleet's claim that Connecticut's ATM statutes were preempted by the Act.

22. On October 9, 1998, following extensive briefing, this court (Arterton, J.) denied the Commissioner's motion for a stay pending appeal based on the traditional factors. The court similarly denied, following argument, the Commissioner's motion for an interim stay pending application to the United States Court of Appeals for the Second Circuit (the "Second Circuit") for a stay pursuant to Fed. R. App. P. 8.

23. The Commissioner appealed the Decision to the Second Circuit on Columbus Day, October 12, 1998, viz. Fleet Bank, National Association v. Burke, et al., Dkt No. 98-9324 (the "Fleet Appeal"). Following an emergency

hearing on that same date the Second Circuit temporarily stayed the Decision and established an expedited schedule for briefing and argument of the Fleet Appeal. The stay expired by its own terms at 5:00 pm on October 23, 1998.

24. On October 23, 1998, the Fleet I Appeal was argued. Also on this date, the Second Circuit denied the Commissioner's request to have the stay extended pending resolution of the Fleet Appeal.

25. Since the Second Circuit's denial on October 23, 1998 of the Commissioner's request to extend the stay, Fleet has levied and collected these convenience fees.

26. On or about November 9, 1998, the Second Circuit issued its decision in the Fleet Appeal. The Second Circuit vacated the Decision on procedural grounds.

27. At oral argument of the Fleet I Appeal, the Commissioner, through counsel, freely admitted that he would, following a ruling favorable to him in the Fleet I Appeal, promptly seek to invoke state law in order to prevent non-depositor ATM fees. In particular, the Commissioner referred to the issuance of cease and desist orders against Fleet and, presumably, against other national banks (including First Union National Bank, appearing as amicus curia) to prohibit such banks from engaging in the lawful practice of charging non-depositor customers for ATM use.

28. Upon information and belief, the Commission has threatened First Union National Bank with service of cease and desist orders unless First Union voluntarily agreed to refrain from levying charges for non-depositor customer ATM use.

29. Based upon the foregoing, Fleet has a reasonable basis to conclude that the Commissioner will act,

ostensibly pursuant to state law, to prevent or to interfere with Fleet's now established practice of charging convenience fees to non-depositor customers for ATM usage, including the issuance of cease and desist orders or the institution of state court proceedings pursuant to C.G.S. §§36a-50 et seq.

30. Pursuant to C.G.S. §§36a-50 et seq., the Commissioner could seek to impose civil penalties against Fleet amounting to Seven Thousand Five Hundred Dollars ($7,500.00) for each claimed violation, i.e., for each charge levied by Fleet against a non-depositor using a Fleet ATM.

31. The Commissioner's actions and intended actions are plainly violative of federal law. The OCC, whose interpretations of the Act are entitled to deference, has previously opined that national banks, like Fleet, have the incidental powers under 12 U.S.C. §24(Seventh) to maintain ATMs and to charge non-depositor customers convenience fees for their use. Consequently, there is a justiciable controversy between Fleet and the Commissioner over whether the Commissioner may, under color of state law, interfere with Fleet's federal rights.

32. The Commissioner's actions and threatened actions adversely affect Fleet's ability to conduct its banking business pursuant to the National Bank Act. Unless the Commissioner is enjoined from taking such actions Fleet will be irreparably harmed.

33. Fleet has no adequate remedy at law under which it may obtain redress for the harm caused by the Commissioner's action.

PRAYER FOR RELIEF

WHEREFORE, First Union request that judgment be entered in this action:

1. Declaring that the Commissioner may not interfere with or prohibit Fleet from exercising the power to charge convenience fees to non-depositor customers using its ATMs:

2. Enjoining the Commissioner, as well as any person acting in concert with him or pursuant to his direction, from acting in any way to prevent, impede or interfere with Fleet's valid exercise of its statutory right, pursuant to federal law, to charge non-depositors of Fleet valid exercise of its statutory rights, pursuant to federal law, to charge non-depositors of Fleet for ATM usage including, but not limited to, the issuance of cease and desist orders, the promulgation of conflicting regulations or other administrative pronouncements, the institution of state court enforcement or declaratory judgment proceedings, or the assessment of fines or other civil penalties;

3. Awarding Fleet its cost and attorneys' fees pursuant to 42 U.S.C. §1983; and

4. Granting Fleet such other and further relief as this court may deem just and proper.

PLAINTIFF,
FLEET BANK, N.A.

Daniel L. FitzMaurice
Fed. Bar #ct05331
Day, Berry & Howard LLP
CityPlace I
Hartford, CT 06103-3499
(860) 275-0100

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FIRST UNION NATIONAL BANK, Plaintiff,	)	
V.	)	CIVIL ACTION NO. 3-98-CV-02171 (JBA)
THE HONORABLE JOHN P. BURKE, Defendant.	)	
FLEET BANK, NATIONAL ASSOCIATION Plaintiff,	)	
V.	)	CIVIL ACTION NO. 3-98-CV-02186 (JBA)
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT, THE CONNECTICUT DEPARTMENT OF BANKING, Defendants.	)	DECEMBER 1, 1998

MOTION FOR A TEMPORARY RESTRAINING ORDER, OR, IN THE ALTERNATIVE, FOR A PRELIMINARY INJUNCTION

The Office of the Comptroller of the Currency ("OCC") hereby moves this Court, pursuant to Fed. R. Civ. P.65, to issue a temporary restraining order, or, in the alternative, a preliminary injunction, restraining Defendants John P. Burke, in his official capacity as the Banking Commissioner for the State of Connecticut, and the Connecticut Department of Banking, their officers, agents, employees, and all those acting in concert with them, from initiating or continuing any enforcement action against a national bank, seeking the records of any national bank except as authorized under federal law, or interfering in any other way with the OCC's exclusive authority to supervise national banks and enforce their compliance with federal and state law affecting their banking operations ("federal and state banking laws"), until a final hearing and determination of the merits in the above-captioned action.

Unless Defendants are restrained and enjoined by order of this Court, the OCC will suffer immediate and irreparable injury in that the OCC's exclusive authority to enforce national banks' compliance with federal and state banking laws will be usurped by Defendants in contravention of federal law, as more fully explained in the accompanying Memorandum of Law and Affidavit of Dennis Vealitzek, Senior Advisor to the Senior Deputy Comptroller for Bank Supervision Operations. Defendants are causing injury to OCC by issuing a cease and desist order against three national banks, two of which are plaintiffs in this action, for claimed violations of state law associated with fees charged by the banks for use of their ATMs by non-depositor customers. The OCC's injury is irreparable because Defendants' enforcement proceedings causes these national banks to respond to the state's supervisory regime in derogation of the OCC's supervision of these federal instrumentalities and because the OCC has no remedy at law for Defendants' ongoing interference with OCC's supervisory authority.

Wherefore, the OCC moves the Court to issue a Temporary Restraining Order or Preliminary Injunction restraining and enjoining Defendants from initiating or continuing any enforcement action against a national bank, seeking the records of any national bank except as authorized under federal law, or interfering in any other way with the OCC 's exclusive authority to supervise national banks and enforce their compliance with federal and state banking laws, until a final hearing and determination of the merits.

Respectfully submitted,

RAYMOND NATTER
Acting Chief Counsel

ROBERT B. SERINO
L. ROBERT GRIFFIN

Dated December 1,1998

HORACE G. SNEED
Assistant Director
Michigan State Bar # P33434

Local Counsel:

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of the Currency
250 E Street, S.W.
Washington, D.C. 20219
(202) 874-5280
(202) 874-5279 (facsimile)

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion For Temporary Restraining Order, or, In the Alternative For a Preliminary Injunction was forwarded by facsimile and first class mail, postage prepaid, to the following counsel of record on this 1st day of December, 1998.

William Prensky
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_____

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ASSISTANT U.S. ATTORNEY
P0 BOX 1824
NEW HAVEN, CT 06508
(203) 821-3700

STATE OF CONNECTICUT
DEPARTMENT OF BANKING
260 CONSTITUTION PLAZA • HARTFORD, CT
06103-1800

John P. Burke
Commissioner

IN THE MATTER OF:	*	NOTICE OF INTENT
	*	TO ISSUE ORDER
	*	TO CEASE AND
	*	DESIST
FIRST UNION	*	
NATIONAL BANK	*	NOTICE OF INTENT
	*	TO ISSUE ORDER
	*	IMPOSING CIVIL
FLEET NATIONAL	*	PENALTY
BANK	*	
	*	NOTICE OF RIGHT
	*	TO HEARING
BANKBOSTON, N.A.	*	
	*	AND
("Respondents")	*	
	*	TEMPORARY
	*	ORDER TO CEASE
	*	AND DESIST

I. LEGAL AUTHORITY AND JURISDICTION

Pursuant to the authority granted by Section 36a-17(a) of the Connecticut General Statutes, the Banking

TEL: (860) 240-8299
FAX: (860) 240-8178

Commissioner (the "Commissioner") has investigated the activities of the Respondents to determine if they have violated the provisions of Part IV of Chapter 664c of the Connecticut General Statutes, "Automatic Teller Machines, Satellite Devices and Point of Sale Terminals" (the "Act").

Section 36a-17(a) of the General Statutes states in relevant part that:

> The commissioner, in the commissioner's discretion, may make such public or private investigations or examinations within our outside this state, concerning any portion subject to the jurisdiction of the commissioner, as the commissioner deems necessary to carry out the duties of the commissioner.

Section 36a-52(a) of the Connecticut General Statutes states:

> Whenever it appears to the commissioner that any person has violated, [or] is violating . . . any provision of the general statutes within the jurisdiction of the commissioner . . . the commissioner may send a notice to such person by registered or certified mail return receipt requested. The notice shall be deemed received by the person on the earlier of the date of actual receipt, or seven days after mailing. Any such notice shall include: (1) A statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which

> the hearing is to be held; (3) a reference to the particular section of the general statutes . . . alleged to have been violated; (4) a short and plain statement of the matters asserted; and (5) a statement indicating that such person may file a written request for a hearing on the matters asserted within fourteen days of receipt of the notice. If a hearing is requested within the time specified in the notice, the commissioner shall hold a hearing upon the matters asserted in the notice, unless the person fails to appear at the haring. After the hearing, the commissioner shall determine whether an order to cease and desist should be issued against the person named in the notice. If the person does not request a hearing within the time specified in the notice or fails to appear at the hearing, the commissioner shall issue an order to cease and desist against the person. No such order shall be issued except in accordance with the provisions of chapter 54.

Section 36a-52(b) of the Connecticut General Statutes states:

> If the commissioner finds that the public welfare requires immediate action, the commissioner may incorporate a finding to that effect in the notice sent in accordance with subsection (a) of this section and issue a temporary order requiring the person to cease and desist from the activity which constitutes

> such alleged violation. Such temporary order shall become effective on receipt and, unless set aside or modified by a court, shall remain in effect until the effective date of a permanent order or dismissal of the matters asserted in the notice.

Section 36a-50(a) of the Connecticut General Statutes states:

> (1) Whenever the commissioner finds as the result of an investigation that any person has violated any provision of the general statutes within the jurisdiction of the commissioner, . . . the commissioner may send a notice to such person by registered or certified mail, return receipt requested. The notice shall be deemed received by the person on the earlier of the date of actual receipt or seven days after mailing. Any such notice shall include (A) a statement of the time, place, and the nature of the hearing; (B) a statement of the legal authority and jurisdiction under which the hearing is to be held; (C) a reference to the particular sections of the general statutes, regulations, rules or orders alleged to have been violated; (D) a short and plain statement of the matters asserted; (E) the maximum penalty that may be imposed for such violation; and (F) a statement indicating that such person may file a written request for a hearing on the matters asserted within fourteen days of receipt of the notice.
>
> (2) If a hearing is requested within the time specified in the notice, the commissioner shall hold a hearing upon the matters asserted in the notice unless such person fails to appear at

> the hearing. After the hearing, if the commissioner finds that the person has violated any such provision, . . . the commissioner may, in the commissioner's discretion and in addition to any other remedy authorized by law, order that a civil penalty not exceeding seven thousand five hundred dollars per violation be imposed upon such person. If such person does not request a hearing within the time specified in the notice or fails to appear at the hearing, the commissioner may, as the facts require, order that a civil penalty not exceeding seven thousand five hundred dollars per violation be imposed upon such person.
>
> (3) Each action undertaken by the commissioner under this subsection shall be in accordance with the provisions of chapter 54.

II. MATTERS ASSERTED

1. Respondent First Union National Bank is a national banking association with its main office located at 301 South Tryon Street, Charlotte, North Carolina.
2. Respondent Fleet National Bank is a national banking association with its main office located at 1 Monarch Place, Springfield, Massachusetts.
3. Respondent BankBoston, N.A. is a national banking association with its main office located at 100 Federal Street, Boston, Massachusetts.
4. Respondents maintain branches and automated teller machines ("ATMs") in Connecticut.
5. On September 14, 1995, the Commissioner opined that Section 36a-156 of the Act prohibits state-chartered or federally-chartered banks in Connecticut from imposing a transaction fee for the use of their

ATMs by person who does not otherwise maintain a banking relationship with such banks ("surcharge").

6. The Commissioner's September 14, 1995 opinion has not been overturned by any court.

7. Respondents are currently imposing surcharges for use of their ATMs in Connecticut.

III. VIOLATIONS OF CONNECTICUT LAW

Section 36a-156 of the Act provides, in part, that:

> (a) One or more banks, Connecticut credit unions or federal credit unions which have established a satellite device or point of sale terminal shall make the satellite device or point of sale terminal available on a nondiscriminatory basis for use by any other bank, Connecticut credit union or federal credit union, upon payment by each such other bank or credit union of a reasonably proportionate share of all acquisition, installation and operating costs of the satellite device or point of sale terminal. The satellite device or point of sale terminal shall identify with equal prominence all of the banks, credit unions or network systems which use the satellite device or point of sale terminal.

Section 36a-412(a)(4)(B) of the Connecticut General Statutes, as amended by P.A. 97-223 and P.A. 98-177, states, in part, that:

> The laws of this state shall apply to any branch in this state of a federally-chartered out-of-state bank to the same extent as such laws would apply if the branch were a federal bank.

Section 36a-2(41), as amended by P.A. 97-223 and P.A. 98-258, states the

> "Out-of-state bank" means any institution that engages in the business of banking, but does not include a bank, Connecticut credit union, federal credit union or out-of-state credit union;

1. The Respondents are out-of-state banks within the meaning of Section 36a-2(41) of the Connecticut General Statutes, as amended.
2. Pursuant to Section 36a-412(a)(4)(B), as amended, as federally-chartered out-of-state banks, the Respondents are subject to Section 36a-156 of the Act.
3. The Respondents' imposition of a surcharge constitutes a violation of Section 36a-156 of the Act.
4. The Respondents' violation of Section 36a-156 of the Act, forms the basis for the issuance of an Order to Cease and Desist pursuant to Section 36a-52 of the Connecticut General Statutes and Order Imposing Civil Penalty pursuant to Section 36a-50 of the Connecticut General Statutes.

IV. NOTICE OF INTENT TO ISSUE ORDER TO CEASE AND DESIST AND NOTICE OF INTENT TO ISSUE ORDER IMPOSING CIVIL PENALTY

WHEREAS, the Commissioner has determined that the Respondents have violated Section 36a-156 of the Act, which violations constitute sufficient grounds to issue an Order to Cease and Desist pursuant to Section 36a-52 of the Connecticut General Statutes and Order Imposing Civil Penalty pursuant to Section 36a-50 of the Connecticut General Statutes.

AND WHEREAS, the Commissioner intends to impose a civil penalty upon each Respondent not to exceed $7,500 per violation.

NOW THEREFORE, pursuant to Sections 36(a)-52(a) and 36a-50(a) of the Connecticut General Statutes, the Commissioner affords the Respondents an opportunity for a hearing on the assertions set forth above. A hearing will be granted to the Respondents if a written request for a hearing is received by the Department of Banking, Legal Division, 260 Constitution Plaza, Hartford, Connecticut 06103 within fourteen (14) days following the Respondents' receipt of this notice as defined by Sections 36a-52 and 36a-50 of the Connecticut General Statutes. The notice shall be deemed received on the earlier of the date of actual receipt, or seven days after mailing. The enclosing Appearance Form must be filled out and returned with each Respondent's written request for a hearing and mailed to the above address. If the Respondents will not be represented by an attorney at the hearing, please fill out the Appearance Form as "pro se." If a hearing is requested by any Respondent, the hearing will be held at 10 a.m. on December 3, 1998, at the Department of Banking, 260 Constitution Plaza, Hartford, Connecticut, in accordance with the provisions of Chapter 54 of the General Statutes, unless such Respondent fails to appear at the requested hearing. At such hearing, such Respondent will have the right to appear and present evidence and argument on all issues of fact and law to be considered by the Commissioner. If a hearing is not requested within the time prescribed, the Commissioner will issue an order that each such Respondent CEASE AND DESIST from violating Section 36a-156 of the Act, which prohibits the Respondents from imposing surcharges in Connecticut, and order that a CIVIL PENALTY be imposed upon each such Respondent not to exceed $7,500 per violation.

V. FINDING AND TEMPORARY ORDER REQUIRING RESPONDENTS TO CEASE AND DESIST FROM VIOLATING SECTION 36a-156 OF THE ACT

WHEREAS the Commissioner finds that the public welfare requires immediate action with respect to the Respondents' conduct, in that, among other things: (1) persons, throughout the state, who are non-depository customers of the Respondents will be financially burdened by their unlawful and unauthorized surcharges, (2) Respondents collectively own the majority of ATMs in Connecticut, which severely limits the ability of Connecticut consumers to use ATMs that do not impose surcharges, and (3) Respondents will not be able to refund surcharges imposed, during the period that this administrative action is pending, by transmitting the surcharges to the non-customers' accounts in the case of non-customers who have closed their bank accounts.

THE COMMISSIONER THEREFORE ORDERS, pursuant to Section 36a-52(b) of the Connecticut General Statutes, that First Union National Bank, Fleet National Bank and BankBoston, N.A., CEASE AND DESIST from imposing surcharges for the use of each such Respondent's ATMs in Connecticut, in violation of Section 36a-156 of the Act. This temporary order shall become effective on receipt and, unless set aside or modified by a court, shall remain in effect until the effective date of a permanent order or dismissal of the matters asserted in this notice.

Dated at Hartford, Connecticut
this 10th day of November 1998.

_____
John P. Burke
Banking Commissioner

CERTIFICATION

I hereby certify that on this 10th day of November 1998, the foregoing Notice of Intent to Issue Order to Cease and Desist, Notice of Intent to Issue Order Imposing Civil Penalty, Notice of Right to Hearing, and Temporary Order to Cease and Desist was sent by registered mail, return receipt requested to Thomas H. O'Brien, President, First Union National Bank, 300 Main Street, Stamford, Connecticut 06904, registered mail no. R364328835; John Goorgius, President, First Union National Bank, 301 South Tryon Street, Charlotte, North Carolina 28288, registered mail no. R364328836; William C. Mutterperl, Executive Vice President, Fleet National Bank, 1 Federal Street, Boston, Massachusetts 02211, registered mail no. R364328837; Richard A. Higginbotham, President and CEO-Connecticut, Fleet National Bank, 777 Main Street, Hartford, Connecticut 06115, registered mail no. R364328838; Henrique C. Meirelles, President, BankBoston, N.A., 100 Federal Street, Boston, Massachusetts 02110, registered mail no. R364328839; and R. Nelson Griebel, Regional President, BankBoston, N.A. 1001 Pearl Street, Hartford, Connecticut 06103, registered mail no. R364328840.

_____

Nirja Savill
Principal Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FIRST UNION NATIONAL BANK, Plaintiff, v. THE HONORABLE JOHN P. BURKE, Defendant.	CIVIL ACTION NO. 3-98-CV-02171 (JBA)
FLEET BANK, NATIONAL ASSOCIATION Plaintiff, v. THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT, THE CONNECTICUT DEPARTMENT OF BANKING, Defendants.	CIVIL ACTION NO. 3-98-CV-02186 (JBA) DECEMBER 1, 1998

DECLARATION OF DENNIS VEALITZEK

I, Dennis Vealitzek, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. For the past twenty months, I have served as the Senior Advisor To The Senior Deputy Comptroller for Bank Supervision Operations in the Office of the Comptroller of the Currency ("OCC"), Leann Britton, who is the senior agency official charged with responsibility for the day-to-day supervision of national banks. In my capacity as Senior Advisor, I am familiar with all aspects of supervising national banks.

2. OCC's success in supervising national banks and ensuring their safety and soundness depends, among other things, upon the absence of any confusion regarding OCC's authority as sole administrator of the national banking system.

3. Actions by state authorities to supervise, police, or examine national banks engender such confusion by suggesting that national banks may be subject to a rival state regime.

4. Any possibility that national banks may also be supervised and policed by a rival administrative authority tends to undermine OCC's authority and ability to implement federal policy. This concern especially holds true when state authorities attempt to bring disciplinary actions enforcing their own (possibly conflicting) interpretation of banking laws. Regardless of whether such actions are ultimately successful, OCC's authority could be irreparably compromised when banks are placed in the untenable position of having to struggle to satisfy possibly competing demands of rival regulators -- or face potentially crippling litigation.

5. In the present situation, the Commissioner's action has subjected national banks to a dilemma -- i.e., accede to the Defendants' unlawful usurpation of OCC's jurisdiction or expose themselves to significant monetary fines imposed by state authorities. As long as any national bank remains subject to this Hobson's choice, OCC's authority over each and every national bank could be severely eroded by the possibility that they too could find themselves in a similar quandary. It is, therefore, plain to me that, unless OCCs authority as sole supervisor of national banks is clarified, our ability to accomplish our mission as a banking supervisor will be irreparably harmed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 1998

_____

Dennis Vealitzek

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Declaration of Dennis Vealitzek was forwarded by facsimile and first class mail, postage prepaid, to the following counsel of record on this 1st day of December, 1998.

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_____

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PO BOX 1824
NEW HAVEN, CT 06508
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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FIRST UNION NATIONAL BANK,	:	
Plaintiff	:	
	:	
FLEET BANK, N.A.	:	
Consolidated-Plaintiff	:	
	:	
OFFICE OF THE COMPTROLLER OF THE CURRENCY	:	
Intervenor-Plaintiff	:	
	:	
v.	:	**NO. 3:98cv2171 (JBA)**
	:	**LEAD DOCKET**
NUMBER		
THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER	:	
Defendant	:	

RULING ON INTERVENOR-PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [DOC. # 37] AND DEFENDANT'S MOTION TO DISMISS [Doc #41]

These motions present the deceptively simple question of who has the authority to administratively enforce state banking laws against in-state branches of national banks. The answer requires analysis of the requirements of the national banking regulatory scheme with respect to the

Connecticut Banking Commissioner's ("Commissioner") recent issuance of administrative cease and desist orders against the plaintiff banks, requiring that they cease imposing on non-depositor customers a surcharge fee for transactions at the banks' automated teller machines ("ATMs").

These now consolidated actions were originally brought by two out-of-state national banks with branches in Connecticut, joined subsequently by the Office of the Comptroller of the Currency ("OCC'") whose request to file an intervening complaint was granted without objection. In its intervening complaint, the OCC claims that by the National Banking Act and related federal banking statutes, Congress intended the OCC to have exclusive administrative enforcement authority over national banks for all laws, including state banking laws related to ATM transaction fees. The OCC seeks a preliminary injunction to enjoin the Commissioner from proceeding with its pending administrative action against the two plaintiff national banks. [doc. #37] The Commissioner seeks to dismiss the OCC's intervening complaint claiming: lack of subject matter jurisdiction, that abstention is required, that the OCC fails to state a claim, and that the regulatory scheme urged by the OCC violates the Tenth Amendment. [doc. # 41]

For the following reasons, the Commissioner's Motion to Dismiss the OCC's Intervening Complaint is DENIED and the OCC's Motion for a Preliminary Injunction is GRANTED, enjoining the Commissioner from proceeding with his pending administrative enforcement proceeding against Fleet Bank and First Union National Bank pending final disposition of the OCC's complaint. This order does not address the Commissioner's interpretation of the ATM statute in dispute, Conn. Gen. Stat. § 36a-156, nor does it preclude either the OCC from initiating its own administrative proceeding related to Conn. Gen. Stat. § 36a-

156 or the Commissioner from further seeking enforcement through judicial means.

Introduction

A. Prior Litigation

Although this action arises within the context of the ongoing dispute between Fleet Bank and the Connecticut Banking Commissioner over whether a national bank may impose surcharge or "convenience" fees on non-depositors who access Fleet's ATMs in the state of Connecticut; the current posture of the case raises an issue not previously before this Court or the Second Circuit in Fleet Bank, Nat'l Ass' n v. Burke, 23 F.Supp.2d 196, vacated 160 F.3d 883 (2d Cir. 1998) (hereafter "Fleet I"): whether the Commissioner's cease and desist order unlawfully interferes with the OCC's exclusive regulatory and enforcement authority over national banks on this subject.

In Fleet I, Fleet sought a declaratory judgment asserting the preemptive effect of the national banking laws over the Banking Commissioner's interpretation of Conn. Gen. Stat. §36a-156. The Second Circuit vacated this Court's ruling that interpreted state law as the predicate step for determining whether the state law conflicted with federal law so as to be preempted. The Second Circuit articulated the principle that Fleet's defensive preemption claim was inadequate to confer subject matter jurisdiction and remanded the case for dismissal. In denying Fleet's motion for reconsideration, the Second Circuit made clear that raising the OCC's claim of exclusive authority over national banks as grounds for reconsideration "is presented too late to warrant consideration in this litigation; moreover, that claim is currently pending in separate litigation now pending in the District Court. Our opinion in this litigation is not intended to deny the District Court any jurisdiction, otherwise

available over a complaint that omits a claim requiring construction of state law." Fleet Bank, Nat'l Ass'n v. Burke, No. 98-9324 (2d Cir. 1999) (order denying Fleet's petition for rehearing).

B. Current Litigation

Immediately following issuance of the Second Circuit's decision on November 9, 1998, the Commissioner issued cease and desist orders directing Fleet, First Union and a third national bank to immediately stop imposing surcharge fees or subject themselves to fines of up to $7,500 per violation. On the same day, Fleet and First Union separately filed these actions under 42 U.S.C. §1983, seeking injunctive relief prohibiting the Commissioner from enforcing his cease and desist order. Simultaneously, Fleet and First Union sought and were denied a temporary injunction in Connecticut superior court in which they sought to enjoin the Commissioner's temporary cease and desist orders on state law grounds expressly reserving their federal law claims for adjudication in federal district court. See Fleet Nat'l Bank v. Burke, 1998 WL 892258 (Conn. Super. Nov. 20, 1998) (Teller, J.). After initially filing an amicus brief in this action, the OCC intervened to preserve what it claims to be its exclusive authority to enforce all banking laws, state and federal, against national banks. By agreement of all parties at oral argument, further administrative proceedings on the cease and desist orders were stayed pending the Court's ruling on the plaintiffs' motions for a preliminary injunction and the Commissioner's motions to dismiss.

C. Overview of National Banking Regulation

1. History of National Banks

Before considering the pending motions, it is informative to overview briefly the origins and history of the

dual state and national banking systems in this country. This dual banking system was not the product of any deliberate or conscious power sharing effort between national and state regulators, but rather an accident of history and the result of the continuing tension between the two structures of government. See Friedman & Friesen, A New Paradigm For Financial Regulation: Getting From Here To There, 43 Md. L. Rev. 413, 416 (1984); Howard H. Hackley, Our Baffling Banking System, 52 Va. L. Rev. 565, 570-71 (1966). See generally Kenneth E. Scott, The Dual Banking System: A Model of Competition in Regulation, 30 Stan. L. Rev. 1 (177)

The Supreme Court first upheld the authority of Congress to charter a national bank in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Later, Congress provided for the chartering of national banks with the National Bank Act of 1863, to provide the nation with a stable system of currency to replace the existing system of notes issued by state banks, and to provide a ready market for the new bonds the federal government was issuing to finance the Civil War. See Geoffrey P. Miller, The Future of the Dual Banking System, 53 Brook. L. Rev. 1, 13 (1987). Indeed, those who drafted the 1863 enabling legislation thought that existing banks soon would exchange their state charters for federal charters and that a dual banking system would exist only during a brief transition period. When state banks showed a reluctance to give up their state charters, Congress imposed a punitive tax on state bank notes, a measure that failed any because banks were able to offer checking accounts as low cost substitutes for the bank notes. See Id. Thus, "[t]he creators of the dual banking system . . were hardly bent on establishing the overlapping scheme of state and federal chartering that we observe today." Id. No matter its origin or intended purpose, the "dual banking system" continues to raise new issues as banks diversify their functions, expand their venues and, as

illustrated in this case, incorporate new technology, such as ATMs, to expand their daily operations.

2. OCC as regulator of national banks

National banks are federally chartered under the National Banking Act of 1874 (12 U.S.C. § 21 et. seq.). Related federal banking statutes have been construed to grant the OCC broad supervisory and enforcement powers over these national banks. See Nationsbank of North Carolina v. Variable Annuity Life Ins. Co., 513 U.S. 251 (OCC "bears primary responsibility for surveillance of the 'business of banking' authorized by [12 U.S.C.]§ 24 Seventh" and is "charged with superintendence of national banks" and "enforcement of banking laws"); Clarke v. Securities Indust. Ass'n, 479 U.S. 388 (1987) ("the Comptroller of Currency is charged with enforcement of banking laws"). Further, the OCC is charged with enforcement of 12 U.S.C. § 36(c), the provision of the National Banking Act that permits national banks to establish and operate branches to the extent permissible for state banks under state law. See Ind. Bankers' Ass'n of New York State v. Marine Midland Bank, 757 F.2d 453 (2d Cir. 1985). As one court has observed, "the supervisory power of the Comptroller [of the Currency] extends over all aspects of a [national] bank's existence." In re Franklin Nat'l Bank Sec. Litigation, 478 F. Supp. 210, 217 (E.D.N.Y. 1979) (identifying the broad supervisory and enforcement powers conferred by the federal banking laws on the OCC, Federal Deposit Insurance Corporation and the Federal Reserve Board).

With narrow exception, national banks are free from "visitorial powers" except as permitted by federal law or court order. Title 12, U.S.C. § 484(a) provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law; vested in the courts of justice or

> such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Although the OCC is not explicitly referenced in Section 484, it has been granted administrative enforcement power under 12 U.S.C. § 1818 to issue cease and desist orders related to any national bank's violations of any "law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the bank," or to prevent any practice that the OCC deems "an unsafe or unsound practice." These "cease and desist orders have been used to regulate all areas of a bank's operations." In re Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 210, 217 (E.D.N.Y. 1979) (citing Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889 (5th Cir. 1978); First Nat'l Bank of Eden v. Dept. of Treasury, Office of the Comptroller of Currency, 568 F.2d 610 (8th Cir. 1978)). In addition, the OCC is empowered to remove a national bank director or officer for violation of a cease and desist order violation of a rule, law or regulation, participation in an unsafe or unsound banking practice and enumerated acts of dishonesty or unfitness. See 12 U.S.C. § 1818(e), (f), & (g). The OCC also utilizes informal procedures to obtain a national bank's compliance. See, e.g., In re Franklin Nat'l Bank Securities Litigation, 478 F. Supp. 210 (E.D.N.Y. 1978) ("Achieving voluntary compliance with laws, recommendations and agreements is often the rule rather than the exception."); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1962) (noting most banks heed the "[r]ecommendations by the agencies concerning banking practices without the necessity of formal compliance procedures.").

Since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) and Osborne v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), there has been some tension

between the national banks' status as federal instrumentalities subject to a national scheme of federal law and regulations and the States' power to regulate the business of these national banks through state laws. As a general rule, state laws have been found applicable national banks provided the state laws do not unfairly discriminate against national banks, favor state-chartered banks or frustrate, destroy, interfere with, or hamper national banks' exercise of their powers. See Barnett Bank v. Nelson, 517 U.S. 25, 33-34 (1996); Anderson Nat'l Bank v. Luckett 321 U.S. 233, 248 (1944) ("national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of banks' functions.").

Certain provisions of the federal banking statutes explicitly subject the grant of a national bank's powers to limitations imposed by sate law. For example, 12 U.S.C. § 36(c), which was amended by the Riegle-Neal Interstate Banking Act of 1994, Pub. L. 103-328, Sept. 28, 1994, now grants national banks the authority to operate interstate branches to the extent permitted under state law.[1] See, e.g., 12 U.S.C. § 92(a) (the OCC may grant fiduciary powers "by special permit to national banks applying therefor, when not in contravention of State or local law"). Provisions like Section 36(c) recognize the purpose of competitive equality, namely that national banks should not be hampered in their ability to compete with their state bank counterparts.

However, other federal banking law provisions, enumerating national banks' powers have been interpreted as allowing national banks to offer services and to compete by methods otherwise not otherwise available under state law.

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[1] Although ATMS were considered branches under the prior version of Section 36(c), see Independent Bankers Association of America v. Smith, 534 F.2d 921 (D.C. Cir. 1976) (overruling OCC's prior interpretation that ATMs established by national banks were not branches), ATMs are now explicitly excluded from the definition of branches. See 12 U.S.C. § 36(j).

See, e.g., Barnett Bank v. Nelson, 517 U.S. 25 (1996) (concluding that a federal statute granting a national bank an authorization) permission or power "does not condition federal permission upon that of the State"); Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954) (holding that federal statute permitting national banks to receive savings deposits preempted a state statute prohibiting certain state and national banks from using the word "savings" in their advertising)

Whether state law is preempted by federal banking law is often first resolved by the OCC and is referred to as "administrative preemption." As one commentator has observed, "the decision: to preempt springs solely from the agencies. Courts are thus forced to determine the acceptable scope of administrative preemption based on the legislative histories of the enabling acts, the extent of conflict between state and federal provisions, and the policy choices implicated by administrative preemption." James G. Kreissman, Administrative Preemption in Consumer Banking Law, 73 Va. L. Rev. 911, 929 (1987). While some in Congress have thought that the OCC's administrative preemption of state law "is inappropriately aggressive resulting in preemption of State law in situations where the federal interest did not warrant that result,"[2] that issue is not directly raised thus far in this action, since the OCC does not argue that the state ATM law is preempted, but rather only it may enforce that law against national banks through its administrative action.

Jurisdictional Challenges

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[2] H. R. Conf. Rep. No. 103-651 at 53, reprinted in 1994 U.S.C.A.A.N. 2068, 2074 (discussing the OCC's preemption of New Jersey state consumer protection law in the context of the impact of the Riegle-Neal Act of 1994 permitting national banks to establish interstate branches).

The Commissioner has moved to dismiss the OCC's intervening complaint on the following four grounds: 1) this Court lacks jurisdiction over the OCC's intervening complaint in the absence of jurisdiction over the plaintiff national banks' complaints; 2) abstention is required under the Younger doctrine; 3) the OCC's intervening complaint fails to state a cause of action, and 4) even if the OCC does have exclusive administrative enforcement authority for Connecticut's ATM law as applied to national banks, such a role violates the Tenth Amendment.

A. Subject Matter Jurisdiction

The Court must initially satisfy itself that it has subject matter jurisdiction over the OCC's intervening complaint before considering any request for relief based upon the merits of the case. See Town of West Hartford v. Operation Rescue, 915 F. 2d 92 (2d Cir. 1990) ("The question of subject matter must be confronted at the threshold of the case.")

1. Relation between jurisdiction over the OCC's intervening complaint and national banks' complaints

The Commissioner contends that if the Court lacks jurisdiction over the plaintiff banks' original complaints, it necessarily lacks jurisdiction over the OCC's intervening complaint and thus the Court must first determine whether it has jurisdiction over the banks' complaints before determining whether its jurisdiction over the OCC's intervening complaint. The Commissioner relies upon "[t]he longstanding and clear rule is that 'if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by intervention of a plaintiff with a sufficient claim.'" Pressroom Unions-Printers League Income Sec. Fund v. Continental Assurance Co., 700 F. 2d 889, 893 (2d Cir.) cert. denied 464 U.S. 845 (1983) (quoting Pianta H. M.

Reich Co., 77 F.2d 888, 890 (2d Cir. 1935)). See also 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1917, at 457 (2d ed. 1986) (intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action).

The Commissioner is only partially correct. While the existence of a properly asserted federal claim by the OCC does not and could not cure the absence of jurisdiction over the banks' complaint, such alleged deficiency does not divest this Court of jurisdiction over the OCC's complaint since a trial court has discretion to consider the intervenor's complaint and corresponding motion for a preliminary injunction as a separate action if jurisdiction is proper with respect to the intervenor's complaint, avoiding the unnecessary and overly formalistic procedure of dismissing the pending action and requiring the OCC to refile the matter. See Town of West Hartford v. Operation Rescue, 915 F. 2d 92 (2d Cir. 1990) (remanding intervenor's claims for discretionary consideration notwithstanding dismissal of the original plaintiff's complaint for lack of subject matter jurisdiction); 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §1917 at 458-59 ("if there is an independent basis for jurisdiction with regard to the intervenor[,] the court has discretion to treat his pleading as a separate action in order to adjudicate the claims raised by him."). Therefore, while reserving judgment on the issue of its jurisdiction over the banks' complaints, the Court will treat the OCC's intervening complaint as a separate action for the purpose of considering subject matter jurisdiction.

2. Jurisdiction over OCC's Intervening Complaint

In its intervening complaint dated December 1, 1998, the OCC assets jurisdiction under 28 U.S.C. § 1331 and § 1337 as an action arising under the Supremacy Clause of the United States Constitution and federal statutes, 12 U.S.C. §

24 (Seventh) and §484. (Interven. Compl. ¶ 2) The OCC claims authority to bring this action pursuant to 12 U.S.C. § 93(d) authorizing the OCC to enforce any provision of the banking title, or any other law or regulation or any action suit or proceeding to which the OCC is a party.

In its complaint, the OCC contends that the pending enforcement action by the Commissioner directly interferes with its exclusive authority to regulate and supervise the banking activities of national banks pursuant to its "visitorial power" under 12 U.S.C. § 484. At this stage, the OCC does not challenge the Commissioner's interpretation of Conn. Gen. Stat. § 36a-156, nor its applicability to these national banks, but instead disputes the Commissioner's administrative enforcement authority to issue cease and desist orders against national banks, claiming the Commissioner's actions abrogate the OCC's exclusive administrative enforcement authority provided in 12 U.S.C. § 24 (Seventh), 12 U.S.C. § 484, and/or 15 U.S.C. § 1693(o).

Thus, neither interpretation or state banking law (Conn. Gen Stat. § 36a-156), nor its preemption by federal banking law is put in issue by the OCC's complaint and motion. The narrow issue presented is whether the Commissioner's pending cease and desist order violates the OCC's claimed right of exclusive regulatory authority over these plaintiff national banks.

Exercising its discretion to consider the OCC's intervening complaint as a separate action brought under federal law, the Court concludes that it has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 to determine the OCC's claim of exclusive authority.

B. Abstention Arguments

The Court next considers the Commissioner's contention that the Court must nonetheless abstain under the Younger doctrine, in that the "normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions." Younger v. Harris, 401 U.S. 37, 45 (1971).

The test of whether Younger abstention is appropriate is "(1) whether there is an ongoing state proceeding; (2) whether an important state interest is involved; and (3) whether the federal plaintiff has an adequate opportunity for judicial review of his [federal] constitutional claims during or after the proceeding." University Club v. City of New York, 842 F. 2d 37, 49 (2d Cir. 1988). Although the Younger doctrine emerged in the context of criminal proceedings, subsequent decisions have liberally expanded it, to the point that abstention may now be proper even if the ongoing state proceeding is administrative and the plaintiff must wait for state court review to have its constitutional claim heard. See Ohio Civil Rights Comm'n v. Dayton Christian School, 477 U.S. 619, 628-29 (1986).

The OCC argues that the Court has an unflagging obligation to exercise the jurisdiction given to it and that the Younger doctrine is inapplicable when the United States is a party to the action. However, the Supreme Court in Colorado River Water Conservation District v. United States, 424 U.S. 800, 816 n.23, expressly left open this question of "when, if at all, abstention would be appropriate where the Federal Government seeks to invoke federal jurisdiction." The OCC contends that Younger's policy of avoiding conflicts between the state and federal courts is more appropriate in the case of private litigants but that by "the time the United States brings suit in federal court against a state, any attempt to avoid a federal-state conflict would be futile." (OCC Reply Br. at 3, citing United States v. Composite State Board of Med. Examiners, 656 F. 2d

131, 136 (5th Cir. 1981) (finding abstention inappropriate where federal government sought to enjoin state authorities from taking disciplinary actions against a doctor employed by the federal government).)

In contrast, the Commissioner urges this Court to follow the Sixth Circuit's approach in United States v. Ohio, 614 F.2d 101, 105 (6th Cir. 1979), applying the Younger abstention doctrine notwithstanding the presence of a federal agency as a federal plaintiff. In United States v. Ohio, the Government filed a declaratory action against the State of Ohio alleging that the imposition of state taxes on government contractors was improper under state law. Notwithstanding the anticipation that the issue of the constitutionality of the state tax assessments would inevitably be raised in the course of the challenge to the state tax, the Sixth Circuit found abstention appropriate under either Pullman and Younger, reasoning that the constitutional issue could be raised in the state forum and there was no indication that the United States could not intervene and raise its constitutional claims in the state proceeding. Analogously, the Commissioner argues that the "question of whether the OCC has the exclusive authority under the National Banking Act to interpret and enforce Connecticut's ATM law can be properly litigated in the presently ongoing state proceedings, either by the national banks or the OCC itself." (Def.'s Opp'n to OCC's Mot. for Prelim. Inj. at 7). United States v. Ohio is, however, distinguishable since the sole basis for federal jurisdiction was the status of the United States as plaintiff and the only issue raised on the face of the complaint was a challenge to the state's interpretation of state law. In contrast, the OCC is not only the intervening plaintiff in this case, but alleges solely a federal claim-- its exclusive enforcement authority under national banking law-- not the state's interpretation of its banking law. Therefore, no questions of state law affect the OCC's federal claim of exclusive enforcement authority of that state law.

Moreover the CCC is not a party to the pending administrative enforcement proceeding,[3] and neither national bank has yet raised the OCC's claim of exclusive authority as a defense in that proceeding. See Fleet Nat'l Bank v. Burke, 1998 WL 892258 (Conn. Super. Nov. 20, 1998) (Teller, J.) (noting that national banks have "expressly reserved for federal court adjudication their federal law preemption claims and their claim that the Office of the Comptroller (OCC) has sole enforcement power over national banks' violations of regulatory requirements, and that the commissioner is deprived of any authority to issue the cease and desist order."). Although the national banks are the subjects of the pending cease and desist orders and their interest in raising the OCC's exclusive enforcement authority overlaps to some extent with OCC's claim in this action, the OCC's interest in preserving what it perceives to be its exclusive regulatory authority over national banks extends far beyond the plaintiff banks' particular interest in imposing surcharge fees, with probable ramifications beyond the current dispute, to the national regulatory scheme over national banks. See Federal Home Loan Bank v. Empie, 778 F.2d 1447 (10th Cir. 1985) (finding the federal government's strong interest in maintaining a uniform and predictable enforcement scheme for federally-chartered savings and loan associations made abstention improper); United States v. Village of Palantine, Illinois, 845 F.Supp. 540, 544 (N.D. Il. 1993) (holding abstention inappropriate where the federal government's interest in preserving fair housing throughout the United States was "much broader than those of the state court defendants."). The OCC argues that it would be futile for this Court to abstain and force it to intervene in precisely the state proceeding that it claims the Commissioner lacks authority to conduct in order to raise its claim of exclusive

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[3] The OCC filed an amicus brief in the banks' unsuccessful state court proceeding seeking a temporary injunction. The Commissioner contends that the OCC would be permitted to intervene in the state administrative proceedings under state law. (Opp'n to OCC's Mot. for Prelim. Inj. at 7).

enforcement authority. The OCC's complaint makes no claim that the state banking law, Conn. Gen. Stat. §36a-156, is preempted by federal law, but rather that state proceeding interferes with its exclusive regulatory enforcement authority over national banks. Without needing to resolve the larger issue of whether abstention is ever appropriate when the federal government raises a federal claim against a state in federal court, the Court finds that under these circumstances abstention is not appropriate given that the OCC is not a litigant in the pending state proceeding, its interests are broader than those of the respondent national banks, the strong federal interest in a uniform enforcement mechanism over national banks is at least as important as the State's interest in enforcing its banking laws, the OCC's interest in asserting its regulatory authority to enforce state law is not necessarily antithetical to the state's interest in insuring compliance with state law, and that the precise nature of this dispute--jurisdictional--indicates the inadequacy of the opportunity for state judicial review. Accordingly, the Court declines to abstain on these grounds.

Preliminary Injunction Standard

Having satisfied itself that jurisdiction exists and abstention would be improper, the Court now considers whether the OCC has met the requirements for preliminary injunctive relief. A preliminary injunction "is an extraordinary and drastic remedy which should not be routinely granted." Medical Soc. of the State of N.Y. v. Toia, 560 F.2d 535, 537 (2d Cir. 1977). Typically, the party seeking a preliminary injunction must show a risk of irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make a fair ground for litigation and a balance of hardships tipping in the movant's favor. See Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996); Polymer Tech. Corp. v. Mimran, 37 F.3d 74, 77-78 (2d Cir. 1994). However, when the preliminary injunction "seeks to enjoin

government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood of success standard." Sal Tinnerello & Sons, Inc. v. Town of Southington, 141 F.3d 46, 51 (2d Cir. 1998). "This exception reflects the idea that government policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." Able v. U.S., 44 F.3d 128, 130 (2d Cir. 1995); International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996); NAACP v. Town of East Haven, 70 F.3d 219, 224 (1995). However, when governmental action is taken pursuant to specific regulatory authority and public interests lie on both sides, the lower standard of serious-question-on-the-merits may apply. See Time Warner Cable of New York City v. Bloomberg, LP, 118 F.3d 917 (2d Cir. 1998) . Although there are public interests on both sides here, there are also substantial private interests that are served if the injunctive relief is issued. Under these specific circumstances, the Court will utilize the more rigorous likelihood of success standard.

The Commissioner further asserts that the preliminary injunction is mandatory in nature and therefore, the OCC must demonstrate a "substantial" likelihood of success. See Johnson v. Kay, 860 F.2d 529, 540 (2d Cir. 1988). Given that the relief sought will not require the Commissioner to undertake any new course of conduct or positive action, but rather to refrain from proceeding with enforcement of its cease and desist order, the Court concludes that the preliminary injunction sought is more aptly characterized as a prohibitory injunction, notwithstanding the fact that many prohibitory injunctions can easily be restated in a manner that makes them appear mandatory in effect. See Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997); Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 34 (2d Cir. 1995) ("[t]he

distinction between mandatory and prohibitory injunctions is not without ambiguities").

Merits of OCC Motion for Preliminary Injunction Relief

A. Likelihood of Success

The OCC claims that the pending cease and order issued by the Commissioner interferes with or violates the OCC's exclusive authority to regulate national banks through regulation and administrative enforcement actions as provided for under federal banking law. In opposition, the Commissioner maintains that: 1) the state has the implicit authority to enforce state ATM laws directly against national banks under the Electronic Funds Act, 15 U.S.C. §1693(q); 2) ATM transactions involving non-depositors do not fall within the "business of banking," and 3) any federal regulatory scheme impairing state authority to enforce state banking laws against national banks violates the Tenth Amendment of the United States Constitution.

Therefore, in order to determine whether the OCC has shown the requisite likelihood of success on the merits, there are four key issues that require analysis:

(1) Whether the OCC has exclusive regulatory authority to enforce compliance with state law by national banks;

(2) Whether the Electronic Funds Transfer Act or any other provision(s) of the National Banking Act confer or permit other authority for state law ATM regulation;

(3) Whether ATM transactions between a national bank and a non-depositor

constitute the "business of banking"; and

(4) Whether a grant of exclusive federal enforcement authority over national banks constitutional under the Tenth Amendment.

1. "Visitorial powers"

The OCC contends that the pending state administrative enforcement of the Commissioner's cease and desist order represents an intrusion on its statutory visitorial and enforcement powers and does not fall within any of the narrow exceptions provided under 12 U.S.C. § 484. The Commissioner disputes the OCC's interpretation of its visitorial authority as overbroad and contrary to precedent establishing State authority to enforce state banking laws against national banks and maintains that he may directly enforce against national bank branches the state banking statute, which he interprets as prohibiting the imposition of ATM surcharge fees on non-depositors, without interfering with the regulatory and enforcement authority over national banks conferred by Congress on the OCC.

Title 12, § 484 of the United States Code states in pertinent part:

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized state auditors and

> examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C. § 484.

Although section 484 does not contain an explicit grant of exclusive regulatory or visitorial power over national banks to the OCC, the OCC contends that section 484 precludes states from any visitorial power over national banks unless authorized by federal law, court order or within the narrow exception created under section 484(b).

The OCC has interpreted federal visitorial power under section 484 as extending to ensuring the bank's compliance with state banking laws. Faced with three state statutes imposing certain credit card requirements on national banks and enforceable by state agencies, the OCC concluded that it alone was vested with enforcement authority:

> The enforcement authority of the Office of the Comptroller of Currency has not been limited to the enforcement of federal law. Although states have an important interest in ensuring that their laws are obeyed, the Office of the Comptroller of Currency is the exclusive regulator of national banks. It is, therefore, the province of the Office of the Comptroller of Currency, not state regulators to examine national banks compliance with state laws Long, 630 F.2d at 988. See generally 12 U.S.C. §1818(b) et. seq. Cf. Conference of Fed. Sav. & Loan Ass'n v. Stein, 604 F.2d 1256 (9th Cir.), aff'd mem.,

> 445 U.S. 921 (1979) (federal regulator is the proper authority to enforce state laws applicable to federal thrifts. Congress has delegated to the Office of the Comptroller of Currency the authority to issue cease and desist orders and to take other enforcement actions, including levying civil money penalties, against national banks to ensure that they comply with the laws applicable to them, including state laws. Long, 630 F.2d at 988-89. See generally 12 U.S.C. §1818(b) et. seq. In light of the foregoing legal authority, the Office of the Comptroller of Currency has consistently maintained that state attempts to exercise supervisory authority over national banks are preempted. [citation to prior interpretive letters omitted].

Interpretive Letter No. 614, [1992-1993 Transfer Binder] Fed. Banking L. Rep. ¶ 83,454 (January 15, 1993).

The term "visitorial" power on which courts have based interpretations of Section 484 has deep historical roots. "At common law the right of visitation was exercised by the King as to civil corporations, and as to eleemosynary ones, by the founder or donor. In the United States the legislature is visitor of all corporations created by it, where there is no individual founder or donor, and may direct judicial proceedings against such corporations for such abuses or neglects as would common law cause a forfeiture of their charters." Guthrie v. Harkness, 199 U.S. 148, 156 (1905) (citations omitted). One of the earliest interpretations of the OCC's "visitorial power" within the context of section 5241,[4] the predecessor to the current section 484, stated:

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[4] "This section provides that no association (meaning national banking associations) shall be subject to any visitorial powers other than such as authorized by this title (63) or are vested in the courts of the

> Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting its business, and enforce an observance of its laws and regulations. Burrill defines the word to mean "inspection; superintendence; direction; regulation." The exercise of no such authority is contemplated by defendants [county tax assessor]. They do not contemplate inspection, supervision, or regulation of complainant's business, or an enforcement of its laws or regulations. On the contrary, their purpose is to ascertain, in a legal way and by legitimate testimony, whether any person had, at the time mentioned, on deposit with the complainant any money subject to taxation in said county which had not been returned by the owners thereof for that purpose.

First Nat'l Bank of Youngstown v. Hughes, 6 F. 737, 740 (6th Cir. 1881), appeal dismissed, 106 U.S. 523 (1883) (county tax assessor could compel bank to produce bank's records to determine whether any depositor had deposited money in bank to avoid tax liability). The OCC's concept of its exclusive enforcement authority is drawn from Nat'l State Bank, Elizabeth, N.J. v. Long, 630 F.2d 981 (3rd Cir. 1980), in which the Third Circuit held that the state banking commissioner was precluded from enforcing the state anti-redlining law against national banks by means of a cease and desist order even though the state anti-redlining statute was not preempted by a federal anti-redlining provision. In reaching its conclusion, the Third Circuit noted:

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country." First Nat'l Bank of Youngstown v. Hughes, 6 F. 737, 740 (6th Cir. 1881).

> Questions about the applicability of state legislation to national banks must be distinguished from the related inquiry of who is responsible for enforcing national bank compliance. In analyzing the latter issue, we find that important federal interests take precedence over competing state concerns. Thus, we find ourselves unable to agree with the district court's determination that state officials have the power to issue cease and desist orders against national banks for violations of the antiredlining statute.

Id. at 987-88.

Recognizing the potential for state law applicability to national banks under federal regulatory control, the Third Circuit observed:

> Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863 . . . . In only a few instances has Congress explicitly preempted state regulation of national banks. More commonly, it has been left to the courts to delineate the proper boundaries of federal and state supervision.

Id. at 986 (emphasis added).

The Commissioner views Long as an aberration and contrary to precedent he claims recognizes state authority to enforce state banking laws against national banks. In so arguing, he relies on Brown v. Clarke, 878 F.2d 627 (2d Cir. 1989) (suit brought by Commissioner against national bank in federal court after the OCC refused to enforce state law against national banks); First Nat'l Bank v. Dickinson, 396

U.S. 122 (1969) (declaratory and injunctive action brought by national bank with OCC as intervening plaintiff against state comptroller following his letter "requesting" bank to cease and desist operations of services which violated state branch banking laws)[5]; Jackson v. Valdosta, 349 F.2d 71 (5th Cir. 1965) (declaratory judgment action by state superintendent of banks seeking declaration that bank could not operate a drive-in banking facility under federal banking law that incorporates state law limits on branching laws); First Nat'l Bank of Bay City v. Fellows, 244 U.S. 416 (1917) (state commissioner could initiate a quo warranto proceeding in state court to test the authority of national bank to engage in trust services).

While these cases indeed involved disputes between state banking authorities and national banks over the application of state law to national banks, they are all actions seeking judicial declaratory or injunctive relief, and do not involve state administrative cease and desist orders. Thus, these cases should be seen as falling within the "visitorial powers" recognized in Section 484 as "vested in the courts of justice." While these cases illustrate ways in which a state may seek enforcement of its state banking laws in either federal or state court, they do not stand for the proposition that states may directly enforce state law against national banks.

The OCC's view of its exclusive administrative enforcement authority for all banking laws, state and federal is consistent with 12 U.S.C. § 36(f), making certain types of state laws applicable to interstate branches of national banks.

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[5] The national bank's request for federal injunctive relief in Dickinson arose after the state had "requested" the national banks to cease and desist from the disputed activity. Even though the OCC intervened to assert federal preemption of state law, nothing in the opinion suggests that the issue of the OCC's exclusive enforcement authority was raised by the parties or even considered by the Supreme Court in its determination that the state's interpretation of its law was correct.

The Riegle-Neal Interstate Banking Act of 1994, amending section 36(c) of the McFadden Act to permit interstate branching, explicitly subjects interstate branches of national banks to "the laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of interstate branches." 12 U.S.C. § 36(f)(1)(A). However, at the same time, Congress also made clear that "the provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced with respect to the such branch by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B) (emphasis added).

Although the legislative history of the Riegle Neal Interstate Banking Act contains some Congressional expression of concern that the OCC historically may have been too willing to find state laws preempted and not enforceable,[6] Congress granted the OCC exclusive enforcement authority over interstate branches' compliance with state banking laws and required it to maintain a report of its preemption determinations for Congressional review under 12 U.S.C. § 36(f)(C). Although ATMs are expressly excluded from the definition of "branches" under Section 36(j), the regulatory structure of Section 36(f)(1)(B) reflects Congressional intent that the existing regulatory scheme remain unchanged in further corroboration of the OCC's view of its exclusive regulatory role.

2. Electronic Funds Transfer Act

The Commissioner claims that the Electronic Funds Transfer Act, 15 U.S.C. §1693 et. seq. (EFTA), which

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[6] See, e.g., H. R. Conf. Rep. No. 103-651 at 53, reprinted in 1994 U.S.C.C.A.N. 2068, 2074 ("During the course of consideration of this title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive resulting in preemption of State law in situations where the federal interest did not warrant that result.").

specifically governs ATM transactions and thus controls the analysis,[7] preserves the state's right to enforce state banking laws against national banks where the state law is a consumer protection measure and is not inconsistent with the Electronic Funds Transfer Act. The statutory section relied on states:

> This subchapter does not annul, alter or affect the laws of any State relating to electronic fund transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.

15 U.S.C. § 1693(q). The Commissioner's claim of authority under the EFTA to enforce Conn. Gen. Stat. § 36a-156 is based on his contention that it is a state "consumer protection" statute that affords consumers greater protection and is not inconsistent with the EFTA. He reasons that since the state ATM statute is unaffected by the EFTA, national banks that violate it cannot be said to have violated the EFTA because state law was not substantively incorporated into the EFTA and thus the OCC's EFTA enforcement authority is inapplicable.

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[7] See American Land Title Assoc. v. Clarke, 968 F. 2d 150 (2d Cir. 1992) (where two statutes governing national banking conflict, the statute that addresses the matter under consideration in specific terms controls over the one that does so in a general manner unless Congress has manifested a clear intent to the contrary).

Without conceding the applicability of the EFTA,[8] the OCC argues that the EFTA, far from displacing OCC exclusive enforcement authority, preserves federal authority to take administrative enforcement actions through cease and desist orders against national banks for violations of state law pursuant to 12 U.S.C. § 1818(b). Section 1693(o) of the Electronic Funds Transfer Act provides:

> Compliance with the requirements imposed under this title shall be enforced . . . , in the case of (a) national banks, and federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency.

(emphasis added).

This OCC enforcement authority is exercised by means of cease and desist orders directed against national banks if any such institution "is about to violate, a law, rule, or regulation, or any condition imposed in writing . . . or any written agreement entered into with the agency." 12 U.S.C. §1818(b)(1). The OCC further argues that the Commissioner's position that he implicitly retains enforcement authority would render the above EFTA administrative enforcement provision nugatory. The language of the EFTA simply does not support the Commissioner's interpretation and does not contain language from which it can be reasonably inferred that Congress intended to disrupt other federal laws including the National Banking Act by an implicit reservation of the power to

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[8] Neither the Commissioner, the national banks nor the OCC has requested a determination from the Federal Reserve Board as to whether Conn. Gen. Stat. § 36a-156 qualifies as a consumer protection statute that is more protective and not inconsistent with the EFTA as contemplated by 15 U.S.C. § 1693(q). The Court need not resolve this issue to consider the Commissioner's argument.

administratively regulate banks to the states. Thus, the Court concludes that an independent state enforcement power for state consumer protection laws against national banks cannot be read into the EFTA.

3. "Business of Banking"

The Commissioner next takes the position that the type of ATM transaction involving a national bank and a non-depositor falls outside "banking business," and therefore outside the scope of the OCC's exclusive regulatory authority. He analogizes the bank's ATMs used to conduct the transaction with a non-depositor to a vending machine that distributes cash instead of sodas, and thus the service has no relation to the business of banking, and constituting a matter over which he retains regulatory authority. This theory, that determination of state regulatory authority over national banks' ATM services is predicated on who accesses the national bank's branches' ATMs, is without legal authority or sound rationale. The ATM service offered to these non-depositors enables them to access their accounts at their own banks from a different geographic location and logically constitutes part of banking business. The fact that the EFTA designates the OCC as responsible for enforcing the law on national banks relative to such electronic transfers further supports the premise that such transactions may reasonably be considered the business of banking when the ATMs are owned and operated by national banks. OCC interpretative letters and regulation give further support to the inclusion of ATM related activity as within the business of banking. "The establishment of ATMs by national banks is authorized by section 24 (Seventh)" since they serve as an instrumentality for performing activities that are incidental to business of banking. Interpretative Letter, No. 789, 1997 WL 402489 (finding that provisions of the Colorado state EFT Act were preempted by federal law). The OCC has also promulgated the following regulation:

> A national bank may perform, provide, or deliver through electronic means and facilities any activity, function or product, or service that it is otherwise authorized to perform, provide or deliver. A national bank may also, in order to optimize the use of the bank's resources, market and sell to third parties electronic capacities acquired or developed by the bank in good faith for banking purposes.

12 C.F.R. § 7.019.

Finally, the Commissioner's argument that these ATM services do not constitute the business of banking seems disingenuous in light of the actions of the state banking commissioner to enjoin fees imposed by banks on such transactions as violative of state banking laws.

4. Tenth Amendment Challenge

Lastly, the Commissioner challenges the OCC's likelihood of success on the grounds that the OCC's expansive reading of the enforcement procedures under the National Banking Act and EFTA, specifically 12 U.S.C. §§ 484 and 36(f), intrudes on Connecticut's constitutional sovereignty under the Tenth Amendment and amounts to "strip[ping] away the sovereign function of state officials to interpret and enforce state laws," thus overstepping the boundary between federal and state authority. (Def. Opp'n to OCC's Mot. for Prelim. Inj. at 3-4). In Printz v. United States, 521 U.S. 98 (1997), the Supreme Court held unconstitutional the enforcement provisions of the Brady Handgun Violence Prevention Act requiring local chief law enforcement officers to perform background checks on gun purchasers. "[T]he whole object of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . . It is the very principle of separate state sovereignty that such a law

offends . . . ."). Id. at 2383. Similarly, in New York v. United States, 505 U.S. 144, 178 (1992), which found unconstitutional the "take title" provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, the Court observed that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require states to regulate."

However, Printz and New York have no applicability to the national bank regulatory scheme, which does not compel the Commissioner to enact or enforce a particular regulatory scheme, but rather has carved out from state control supervisory authority over these federal instrumentalities. Article I, Section 8 of the Constitution authorizes Congress to establish national banks and "to enact legislation for the protection, preservation and regulation of such institutions." Clark v. United States, 184 F.2d 952, 953 (10th Cir. 1950). Under the national banking regulatory scheme, Congress does not direct the state executive to affirmatively function in any particular way, nor does the OCC's exercise of exclusive visitorial powers over national banks preclude the state statutory enactments from being applied to national banks, provided they are not in conflict with and thus preempted by federal banking laws.

By creating such a scheme, Congress has not seized the machinery of state government to achieve federal purposes. The relegation of regulatory and supervisory authority over federal instrumentalities to a single federal regulator does not interfere with the Commissioner's enforcement of state law against state banks, does not interfere with the state's enactment of non-preempted state banking laws applicable to national banks, does not preclude the Commissioner from seeking OCC enforcement of state laws, and expressly leaves available judicial remedies to compel national bank compliance with state law.

Accordingly, the Court finds no basis for concluding that this federal regulatory scheme over federally created instrumentalities Violates the Tenth Amendment. The dual banking system is such that when the states seek to enact laws affecting national banks, they do so subject to the enforcement limitation imposed by Congress for the purpose of protecting against a state's use of its legislative authority to restrict, limit or otherwise penalize national banks.

In light of the persuasive authority that the OCC, not the Commissioner, is empowered to directly enforce state banking law against national banks through administrative orders, the federal bank regulatory structure authorized by the National Banking Act and the EFTA, and the conclusion that ATM transactions with non-depositors related to the business of banking, the Court concludes that the OCC has demonstrated a likelihood of success on the merits of its claim that the Commissioner's cease and desist order interferes with its exclusive enforcement authority over national banks.

B. Irreparable Harm

An irreparable injury is one that is "actual and imminent not remote or speculative," State of N.Y. v. Nuclear Regulatory Comm'n, 550 F.2d 745, 755 (2d Cir. 1977), and cannot be redressed through a monetary award. See JSG Trading Corp. v. Trav-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990). The movant must demonstrate that irreparable harm is likely, not merely possible. As the Second Circuit has instructed lower courts, "we think it often will be more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights." Time Warner Cable of New York v. Bloomberg, LP, 118 F.3d 917 (2d Cir. 1997).

In its motion for a preliminary injunction, the OCC asserts that the Commissioner's pending cease and desist orders and administrative enforcement proceeding causes irreparable injury to it by causing the national banks under its supervisory jurisdiction to respond to the state and thereby interferes with and derogates the OCC's supervision of these federal instrumentalities. The potential imposition on national banks of enormous state penalties for violation of the Commissioner's cease and desist orders might negatively impact their operations and financial stability, and therefore effectively supplants the OCC's authority to oversee their financial integrity.[9] In addition, proceeding with the state administrative enforcement process would presumably require proof of violations, which implicates the Commissioner's review of records of national bank operations,[10] a visitorial power that federal law denies to states, except under narrow circumstances inapplicable in this case. Thus, the Commissioner's enforcement actions continue to displace the OCC's supervisory authority in a way that cannot be undone, since the exercise of such administrative authority by the Commissioner is mutually inconsistent with the OCC's exclusive authority.

The Commissioner points to the OCC's delay in requesting a preliminary injunction as undermining its claim

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[9] Based on the plaintiff banks' estimates that between 10,000 and 15,000 non-depositors use their ATMs daily and the Commissioner's statutory authority to assess a fine of up to $7,500 per violation, the national banks face potential fines of $75,000,000 to $112,500,000 per day.

[10] Although the Commissioner originally requested the national banks' records and threatened to impose the $7,500 fine per violation, in the course of these proceedings he represented his changed intent that he would not subpoena any bank records or levy any fines. His change of intent, however, underscores the infirmities in his asserted power, since to investigate violations and to appropriate penalties necessarily implicates use of visitorial powers. Without such tools, the Commissioner's enforcement power is singularly handicapped.

of irreparable harm. Although the dispute over surcharge fees and the national banks first began in April 1995 when the Commissioner issued an interpretative letter to the national banks and continued when Fleet filed for injunctive and declaratory relief in January 1997, the OCC's interest in preserving its exclusive enforcement authority was not put in issue until the Commissioner issued the cease and desist orders on November 10, 1998. Since the OCC promptly sought intervention within a month, the Court does not find any delay to undermine the OCC's claim of irreparable harm. For the foregoing reasons, the Court finds that the OCC has satisfied its burden of demonstrating irreparable harm.

C. Entitlement to a Preliminary Injunction

Finally, as the Second Circuit recently observed "[w]henever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief." Time Warner Cable of New York City v. Bloomberg, LP, 118 F.3d 917 (2d Cir. 1997).

In this case, however the public interests on both sides of the pending controversy are not really at variance. On the one hand, the Commissioner represents the state interest as compliance with state law by banks that operate within its borders, including protection of the State's banking consumers. On the other hand, the OCC represents the strong federal interest in maintaining a uniform national banking system. Since the OCC's complaint simply challenges how that law will be enforced against national banks not whether the state law prohibits the surcharge fees nor whether such a state law would be preempted by federal law, granting the injunction presumably will not change or alter the applicability of protections afforded under state law.

While the Commissioner couches the public interest in terms of the non-depositors' right not to be charged a surcharge fee, this interest can be advanced as well through OCC enforcement of state law, assuming the state law in fact prohibits the surcharge fees and is not preempted by federal law permitting them, issues not addressed in this ruling. Therefore, public interest in consumer protection will not be altered by issuance of an injunction directed at who will enforce the applicable state law.

Since the two agencies' views of their respective regulatory power to enforce state law against national banks are irreconcilable, and since the OCC has shown a likelihood of success on the merits of its position of exclusive enforcement authority and has adequately shown the irreparable harm to it of ongoing state administrative enforcement proceedings, the OCC has demonstrated entitlement to a preliminary injunction prohibiting the Commissioner from proceeding with his administrative enforcement proceeding on the extant cease and desist order pending final disposition on the merits.

Conclusion

In summary, the OCC's Motion for a Preliminary Injunction is GRANTED [doc. # 37]; and the Commissioner's Motion to Dismiss the OCC's complaint [doc. # 41] is DENIED; the OCC's motion for a temporary restraining order [doc. # 26] and the banks' respective motions for preliminary injunctions [doc. # 2 and doc # 36] are DENIED as moot.

The Commissioner is preliminarily enjoined from proceeding with the pending administrative enforcement proceeding against Fleet Bank and First Union National Bank until final disposition of the merits of the OCC's complaint. This order in no way precludes the OCC from initiating its own administrative proceedings related to Conn.

Gen. Stat. § 36a-156, nor does it preclude the Commissioner from seeking enforcement of this state banking statute against the plaintiff national banks through the courts.

IT IS SO ORDERED.

JANET BOND ARTERTON
United States District Judge

Dated at New Haven, Connecticut: April 7, 1999

Supreme Court, U.S.
FILED
MAY 14 1999
CLERK

No. 98-1661

In The
Supreme Court Of The United States
October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,
Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Steffel v. Thompson, 415 U.S. 452 (1974) 11

Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), ... 14

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13 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 3522 14

Taylor v. Anderson, 234 U.S. 74 (1914) 8

51 U.Chi. L.Rev. 634 (1984) Comment, "Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule," 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

FLEET BANK, NATIONAL ASSOCIATION,
Petitioners

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This action represents a national bank's attempt to avoid a state court or administrative determination of whether Connecticut's Banking Commissioner has correctly interepreted Connecticut law to prohibit the assessment of ATM surcharge fees. In this first strike federal action, the bank attempted to manufacture federal jurisdiction by positing both its state defense and a federal preemption defense to anticipated state action, bringing about exactly the result that a number of this Court's federalism doctrines counsel against: a federal court constructing an important state law that no state court had previously construed. This ruling would not bind a state court, nor could it be enforced against a state official such as the Banking Commissioner. In fact, presently ongoing litigation between these same parties in state court will dispositively determine the state law question, underscoring that the Court of Appeals correctly determined that federal question jurisdiction does not lie in this context.

The petitioner's central argument at every stage of this litigation has been that Connecticut law does not prohibit ATM surcharges. In this critical respect the petitioner's Statement of the Case is misleading. Nothing in the record whatsoever supports the petitioner's characterization of its argument that Conn. Gen. Stat. § 36a-156 does not prohibit ATM surcharge fees as a "supplemental claim." (Petition at 4) To the contrary, this quite clearly was the petitioner's *principal* argument, leading the Court of Appeals to describe the action accurately "primarily an attempt to have a federal court construe a state regulatory statute." (*Id.*, A3)

The petitioner filed a one count complaint in District Court alleging "a justiciable controversy . . . over whether the defendants have correctly interpreted the Connecticut

ATM statutes and, if so, whether these statutes are pre-empted by federal banking law." (Petitioner's App. A81) The petitioner's first Prayer For Relief requests a declaration that "the Connecticut ATM statutes do not prohibit Fleet from exercising the power to charge fees to non-depositor customers using its ATMs." (*Id*). The petitioner pleaded jurisdiction *solely* under 28 U.S.C. § 1331, and never once alleged, or even suggested, that it was pursuing a separate, supplemental "claim" under 28 U.S.C. § 1367. (*See id.* A78)

Finally, after fending off the respondents' argument that the Court should abstain under the *Pullman* doctrine in favor of a state court determination of this state law issue, (*Id.* A51-A57) the petitioner sought a plaintiff's summary judgment *exclusively* on the state law issue: "Connecticut law does not prohibit Fleet from exercising the power to charge fees to non-depositior customers for the use of its ATMs." (*Id.* A89)

Also, although the petitioner correctly states that the action it filed immediately after the Court of Appeals' decision in this case "omits any claim under state law" (Petition at 5), to be complete it should be noted that that suit does not admit the meaning and application of state law, as the Court of Appeals' had indicated was necessary to confer jurisdiction upon a federal court. (Petitioner's App. A23) The parties are still at issue over the construction of the state law that the petitioner claims: 1) does not prohibit ATM surcharge fees, and 2) is preempted by federal law. This dispute has most recently manifested itself in the Commissioner's state law action against the petitioner and two other national banks, seeking to prevent the imposition of ATM fees. (App. A2) Thus far, the petitioner has not agreed that Conn. Gen. Stat. § 36a-156 in fact prohibits such fees.

REASONS FOR DENYING THE WRIT

The petitioner has failed to identify any legal issue that cries out for this Court to determine. This is especially true in light of the ongoing litigation between the parties, which is presently continuing in no fewer than four forums. Rather, the petitioner asks this Court to satisfy its academic curiosity on a matter that does not truly arise in this case and does not otherwise warrant this Court's attention.

I. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO REACH THE ISSUES THE PETITIONER PRESENTS.

Apart from the fact that the petitioner's argument in support of certiorari itself lacks merit, which is addressed in Part II, *infra*, at least two reasons make it imprudent for this Court to accept this case to address the question presented.

First, as the petitioner candidly admits, the parties' dispute over ATM surcharge fees is ongoing in both the state and federal courts. On the same day that the Court of Appeals entered judgment in this case, the petitioner (along with one other national bank) sued the Commissioner (a respondent to this petition) once again in District Court praying for a very similar injunction. (*Compare* Petitioner's App. A82 with A110) The national banks thereafter enlisted the support of the Office of the Comptroller of the Currency ("OCC"), which intervened as a plaintiff in the action and also moved for injunctive relief.

On April 7, 1999, the District Court granted the OCC's motion for a preliminary injunction, although on grounds narrower than either the OCC or the banks had hoped. (*See* id. A163-A164) To this point, the Commissioner alone has appealed to the Court of Appeals for the

Second Circuit, although the appeal period has not elapsed as of this date.

Since the District Court's ruling specifically held that the Banking Commissioner could enforce Connecticut's ban on ATM surcharges in state court, the Commissioner also brought a state court action against the national banks seeking a definitive determination of the meaning of the state law. (App. A2) Although that suit is in its infancy, there are now at least three forums in which the parties may have their respective rights determined and settled (the Second Circuit, District Court and State Court). Thus, accepting the instant case for review might very likely turn out to be an imprudent use of the Court's and the parties' time and resources on an issue that, by the petitioner's own representation, arises often. (Petition at 12 to 17) Indeed, by accepting this case for review, this Court may well interfere with an orderly resolution of the issues that are now squarely before the Connecticut court.

Second, the respondents are obliged to point out that this case is not the case the petitioner describes it to be. *See* Sup. Ct. Rule 15.2. As discussed above, the petitioner has never invoked, either at the District Court or Circuit Court level, the federal court's "supplemental jurisdction" in support of what it now claims to be a state law "claim" -- the meaning of Conn. Gen. Stat. § 36a-156(a). This supposed state "claim" was not a separate count in the petitioner's complaint. The petitioner did not, as it was obliged to do under F.R.C.P. 8(a)(1), specifically allege 28 U.S.C. § 1367 as a jurisdictional basis in its complaint. (*See* Petitioner's App. A78) Nor did the petitioner ever previously defend the District Court's jurisdiction to opine exclusively on the meaning of a state statute by citing either to § 1367, to United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), or to any of the discretionary factors that

supplemental jurisdiction permits the District Court to evaluate.[1/] Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

Thus, even if the issue the petitioner presents were worthy of this Court's consideration, it does not truly arise in this case.[2/] The petitioner's claim that the judgment below conflicts with 28 U.S.C. § 1367 or with any of this Court's decisions under it is entirely manufactured.[3/]

1/ Of course, the reason the petitioner has never before articulated the claim as one of "supplemental jurisdiction" is very simply because its complaint does not raise a supplemental state law "claim," any more than it raises a federal claim. Rather, as the Court of Appeals correctly recognized, the petitioner's federal declaratory action raises what would be its two defenses to a state proceeding brought against it: first, "its state law defense that section 36a-156 does not prohibit the surcharge fee but also, if the state law defense failed, its federal law defense of preemption." (Petitioner's App., A7) Thus, the state law claim "is not entirely distinct from the federal preemption claim. Instead, in reality it presents an independent issue preliminary to the federal claim." (*Id.* A20)

2/ The petitioner further seeks to raise belatedly an argument that its action is truly an action under 42 U.S.C. § 1983. (Petition at 25 n.19) As the petitioner admits, however, its complaint contains no such allegation and it never pursued its claim as such -- and with good reason because it is improbable that its complaint could state a cause of action for a violation of § 1983. Compare First National Bank of Omaha v. Marquette National Bank, 636 F.2d 195, 198 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) (claimed violation of National Bank Act does not give rise to § 1983 action). At any rate, it is the better practice for this Court to decline to review cases recastas a litigant now wishes that it had presented the matter in the courts below.

3/ In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), unlike this case, there *was* an independent basis for federal question jurisdiction, which then permitted the federal court to adjudicate a properly submitted supplemental claim. That

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT LACKED JURISDICTION OVER THIS ACTION.

The Court of Appeals was undoubtedly right in determining that no federal court subject matter jurisdiction existed in this case. The petitioner's claim against the respondent does nothing more than raise its defenses to an anticipated state enforcement action, and therefore does not "arise under" federal law as this Court has consistently construed and applied that phrase. 28 U.S.C. § 1331.[4/] The Court of Appeals' decision is consistent with this Court's well-established jurisdictional precedents, which are designed in part to avoid placing federal courts in the ackward position of deciding important issues of state law.

That the Court of Appeals was correct that the District Court lacked jurisdiction is best illustrated by looking to the judgment that the petitioner sought to defend on appeal and would urge this Court to reinstate. That judgment represents a federal court adjudication of a purely state law issue: whether Connecticut law prohibits banks from charging ATM fees. A federal court is not the final arbitrer of state law, and therefore this federal ruling on state law would not bind a state court. *See* Exxon Corp v. Department of Revenue of Wisconsin, 447 U.S. 207, 226 n.9 (1980). In fact, the only Connecticut court to pass on the issue has held the other way. Fleet Bank, N.A. v. Burke, 45 Conn. Sup. 566, ___ A.2d ___ (1998). Further, the Eleventh Amendment prevents a federal court from granting injunctive relief against a state official on the basis of state

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case does not conflict with this case.

4/ Congress has granted the federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis supplied).

law. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 121 (1984). Thus, the District Court's declaratory judgment in this case would be unenforceable against the defendant Commissioner of Banking. *See* id. at 106 ("[I]t is difficult to think of a greater intrusion of state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

That the Court of Appeals was clearly correct is explained doctrinally by this Court's explications of the "well pleaded complaint rule." Principles of federalism and comity similar to those described in the above paragraph manifest themselves in this doctrine, by which this Court measures whether a case "arises under" federal law for purposes of 28 U.S.C. § 1331. The "well-pleaded complaint rule" represents "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987).

"It is long settled law that a cause of action *arises under* federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Id. (emphasis supplied). The "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 813 (1986). Rather, the well-pleaded complaint rule confines the search for a basis of federal question jurisdiction to "what *necessarily* appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)

(emphasis supplied); *see also* Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 840-41 (1989).[5/]

Specifically, the "well-pleaded complaint rule" precludes federal jurisdiction if a federal question is merely asserted or anticipated as a defense to a state law claim. Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152 (1908). "A defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986).

Several policies underlie and support the well-pleaded complaint rule. This Court has "consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." Id. at 810. The Court's articulated "need for prudence and restraint in the jurisdictional inquiry"; id;[6/] includes considerations of comity counseling against "seizing litigations from state courts merely because one, normally a defendant, goes to federal court to begin his

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[5/] This Court has noted that the vast majority of cases brought under the general federal question jurisdiction of the federal courts include "those in which federal law creates the cause of action" or "where the vindication of a right under state law *necessarily* turned on some construction of federal law." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986). (emphasis supplied) *See* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). The petitioner does not argue that this case falls within either category.

[6/] Inexplicably, the petitioner devotes a separate section of its Petition to criticizing the Court of Appeals' discussion of such "prudential" concerns. (Petition at 22-24) These concerns, however, so clearly underpin the well-pleaded complaint rule and help define its contours that not to articulate and consider them might likely have lead the Court below to err.

federal defense before the state court begins the case under state law." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 n.14 & 21 n.22 (1983); Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). Similarly informing the federal judiciary's prudence is the desire of federal courts to avoid having to decide doubtful questions of state law in order to avoid federal constitutional questions. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1950). These policies would be totally undermined if, in a case like the present one, a potential federal defense, or response to a federal defense, could confer jurisdiction on a federal court, especially where, as here, that federal defense would never arise should the state claims not succeed. Comment, "Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule," 51 U.Chi. L.Rev. 634, 636-39 (1984).

Finally, this Court has eschewed an interpretation of § 1331 that would increase the volume of federal court litigation. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1950). This policy is consistent with this Court's articulated understanding of its "limited jurisdiction" under § 1331. Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986) (federal question jurisdiction long construed as a more limited grant of power than Art. III); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S.1, 9-10 (1983) (well-pleaded complaint rule "limits the number of cases . . . that may be initiated in or removed to federal district court, thereby avoiding . . . a number of potentially serious federal-state conflicts."); Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983) (§ 1331, although broadly phrased, has been continuously construed and limited).

These policies and their application to this case and others do not, as the petitioner suggests, deny a litgant a proper forum for adjudicating its federal claim, nor ultimately deny it a federal forum. "[S]tate courts have the solemn responsibility, equally with the federal courts, to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." Steffel v. Thompson, 415 U.S. 452, 460-61 (1974). Thus, state courts are perfectly capable of adjudicating any federal claim the petitioner might have, and more capable than the federal courts of adjudicating the state claims or defenses of either party.

Further, "the absence of original jurisdiction does not mean that there is no federal forum in which a preemption defense may be heard. If the state courts reject a claim of federal preemption, that decision may ultimately be reviewed on appeal by this Court." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983). See also Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986) (preemption arguments were not properly the basis for a removal petition and must be addressed in the first instance by the state court). That the petitioner would prefer an *original* federal forum, which, contrary to its understanding, it has no "right" to, does not mean that Congress has provided one.

The Court has applied the rule symmetrically in various procedural contexts. Under, the well-pleaded complaint rule, a case does not "arise under" federal law when a litigant with a state law claim sues under state law and raises the defendant's federal defense in its own complaint; Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 150-51 (1908); when that same litigant seeks a federal declaratory judgment that the defendant's federal defense is insufficient; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S.

667, 670 (1950); when the target of the state law claim seeks to remove a state lawsuit to federal court pursuant to 28 U.S.C. § 1441[7/] based upon its federal defense; Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983) (fidelity to Skelly's spirit leads to extension to state declaratory judgment action defendant seeks to remove); or when the target of the state law claim acts preemptively to establish the validity of its federal defense by a federal declaratory judgment action. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). The instant case falls under the *Wycoff* rubric: a preemptive federal action to declare invalid, and enjoin if necessary, a state statute on federal grounds.[8/] The Court of

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7/ 28 U.S.C. § 1441(a): "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

8/ "[A]s in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert." Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). The operation of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), "is procedural only." Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240 (1937). By the Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). To permit a declaratory plaintiff to invoke federal jurisdiction to assert a federal defense, would improperly augment the otherwise limited federal jurisdiction. Id. at 673-74. Thus, if federal jurisdiction would be lacking but for the availability of the federal declaratory judgment procedure, and a federal claim only arises as a defense to a state action, federal jurisdiction is barred. Id. at 672.

As this Court has stated:

Where the complaint in an action for declaratory

Appeals' essential holding in this case is thus consistent with well-established precedent of this Court.

These permutations of the well-pleaded complaint rule apply equally to the defense of federal preemption. "Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint . . . ." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); *see also* Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986) ("[I]t is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue."); Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 14 (1983) (same). Thus, even if the parties were to ignore the state law question the petitioner's complaint posits, they could not confer jurisdiction upon the federal courts.

This Court has recognized a narrow exception to the well-pleaded complaint doctrine, however, for those cases

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> judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-jurisdiction in the district court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952).

in which Congress has "so completely pre-empt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). In such areas, the Court has held that the preemptive force of federal law is "so powerful as to displace entirely any state cause of action." Id. at 64. The petitioner has not sought to fit itself within this exception.[9/]

Rather, the petitioner hangs its federal jurisdictional hat upon a footnote in this Court's decision in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983). In *Shaw* the plaintiffs sought a federal declaratory judgment that the New York Human Rights Law was preempted by ERISA. The Court saw no jurisdictional problem because:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex Parte Young, 209 U.S. 123 (1908). A

9/ To date, the Court has recognized only three areas that are "completely preempted." *See* 13 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 3522 (2d ed. 1998 Supp.). First is the "unique preemptive force of ERISA," 29 U.S.C. §§ 1001, et seq. Id. at pp. 65-66; *see* Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 328 (2d Cir. 1982), *aff'd sub. nom.* Arcudi v. Stone & Webster Engineering, Corp., 463 U.S. 1220 (1983). Second is the Labor Management Relations Act, 29 U.S.C. § 185, et seq. *See* Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983); Avco Corp. v. International Ass'n of Machinists, 390 U.S. 557 (1968). Finally, there are certain tribal claims that are "necessarily federal in character." *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Obviously, none of these three areas of the law is involved in the petitioner's suit; and in our dual system of banking, federal banking law plainly does not "completely" displace state banking law. *Compare* Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754, 758-59 (10th Cir. 1989).

> plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. . . . This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.

Id. (case cites omitted)

Citing *Ex Parte Young*, the first sentence of this footnote stands for the unremarkable proposition that the Eleventh Amendment does not deprive the federal courts of jurisdiction over a "suit against State officials . . . . if the suit seeks to force them to conform their conduct to federal law." 1 J. Nowak & R. Rotunda, Treatise on Constitutional Law (2d ed. 1992) § 2.12, p. 151; *see* Ex Parte Young, 209 U.S. 123, 160-62 (1908). This well-recognized exception to a State's Eleventh Amendment immunity from federal suit does not itself create federal jurisdiction, however, and the federal plaintiff must therefore otherwise be properly in federal court.[10/] The second and third sentences, in context

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[10/] A claimed violation of 42 U.S.C. § 1983 would be an example of a proper jurisdictional basis since in such an instance "federal law creates the cause of action." Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986). *See* Steffel v. Thompson, 415 U.S. 452 (1974). In *Ex Parte Young*, decided before this Court's "arising under" jurisprudence had developed, the federal plaintiffs alleged constitutional violations that would fall within § 1983 (due process and equal protection). Similarly, a number of the circuit court cases cited in support of a purported circuit split (Petition at 12-15) had a jurisdictional basis under § 1983. As noted above, the petitioner did not plead this as a § 1983 action, and it has no cognizable right under that statute.

Additionally, the Court should not be misled into believing that

and in light of this Court later precedents, simply means only that where a claim of "complete preemption" is made out, a federal plaintiff may be said to assert a claim "arising under" federal law. *See* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986).

To read the *Shaw* footnote otherwise would upset the intended symmetry of the well-pleaded complaint rule. Whether a state suit may be removed to federal court is tested by whether the state plaintiff could have begun the action originally in federal court. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 (1983). The respondents clearly could not have brought a action in federal court seeking a declaration that federal law does not preempt the state law. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 670 (1950). Thus, the petitioner cannot manufacture federal question jurisdiction merely by switching the parties around. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952).

Also, to adopt the petitioner's position would be to elevate preemption to the highest plane among federal defenses, including constitutional defenses. Although no other federal defense would suffice to support a removal petition

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the petitioner faced the "Hobson's choice," as the plaintiff did in Ex Parte Young., of violating the law as a test case or continuously violating the law and exposing itself to penalties. (*See* Petition at 24) As the record clearly reflects, the petitioner in September, 1995, asked the Commissioner for his opinion on whether Conn. Gen. Stat. § 36a-156 prohibited ATM charges. (Petitioner's App. A97) Under state law, the petitioner could have asked the Commissioner to reduce this opinion to a declaratory ruling, which the petitioner could then have appealed to state court. Conn. Gen. Stat. § 4-176. (App. A6) Eschewing any of the available state processes, the petitioner instead waited until January, 1997, to bring this federal action.

or a declaratory judgment, the petitioner's view is that any claim of federal preemption does suffice to bring it within 28 U.S.C. § 1331. This is inconsistent with this Court's numerous holdings in other contexts that, to the contrary, at best a claim of federal preemption is on the same plane as any other constitutional defense. Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965) (preemption claim did not require convening of three-judge district court); NOPSI v. Council of New Orleans, 491 U.S. 350, 365 (1989) (For *Younger* abstention purposes, "[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees").

Thus, the Court of Appeals properly described the petitioner's theory as "an ill-advised use of federal question jurisdiction," inappropriately opening the federal courts to preemption claims that should be first litigated in state court because "[i]n almost every area in which state law regulates private conduct, some federal statute can arguably be invoked . . . to provide the basis for a preemption claim." (Petitioner's App. A20-A21).

CONCLUSION

For all of these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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In The

Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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RET. MAY 4, 1999	:	**CV990588717-S**
JOHN P. BURKE, BANKING	:	**SUPERIOR COURT**
COMMISSIONER OF THE STATE	:	**JUDICIAL DISTRICT**
OF CONNECTICUT, and THE	:	**OF HARTFORD**
STATE OF CONNECTICUT	:	
V.	:	
FLEET NATIONAL BANK	:	
FIRST UNION NATIONAL BANK	:	
and BANKBOSTON, N.A.	:	**APRIL 16, 1999**

VERIFIED COMPLAINT

1. This suit is brought by John P. Burke, Banking Commissioner of the State of Connecticut, under the authority of Conn. Gen. Stat. § 36a-50(b) to enforce the provisions of Conn. Gen. Stat. § 36a-156 governing the operation of automated teller machines ("ATMs") in the State of Connecticut.

2. The defendant, Fleet Bank, National Association ("Fleet"), is a national bank doing business in the state of Connecticut.

3. The defendant, First Union National Bank ("First Union"), is a national bank doing business in the state of Connecticut.

4. The defendant, BankBoston, N.A. ("BankBoston"), is a national bank doing business in the state of Connecticut.

5. Fleet owns and operates ATMs in the state of Connecticut.

6. First Union owns and operates ATMs in the state of Connecticut.

7. BankBoston owns and operates ATMs in the state of Connecticut.

8. Fleet has imposed, and on information and belief intends to impose, fees or surcharges and collect them from non-depositors who use its ATMs in the state of Connecticut.

9. First Union has imposed, and on information and belief intends to impose, fees or surcharges and collect them from non-depositors who use its ATMs in the state of Connecticut.

10. BankBoston has imposed, and on information and belief intends to impose, fees or surcharges and collect them from non-depositors who use its ATMs in the state of Connecticut.

11. Conn. Gen. Stat. § 36a-156 does not authorize and thus prohibits the imposition of fees or surcharges on non-depositors who use an ATM machine in the state of Connecticut.

12. The plaintiff, State of Connecticut and the people of the State, have suffered and will continue to suffer immediate and irreparable harm if such fees or surcharges are imposed and collected.

HEREOF FAIL NOT, BUT OF THIS WRIT, with your doings therein, make due service and return according to law.

Dated at Hartford, Connecticut, this 16th day of April, 1999.

PLAINTIFFS
/s/ Richard Blumenthal
RICHARD BLUMENTHAL
ATTORNEY GENERAL
Juris No. 403804

BY:
/s/ William J. Prensky
William J. Prensky
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Please enter our appearance for
the plaintiffs in this action.

Richard Blumenthal
Attorney General

/s/ William J. Prensky
William J. Prensky
Assistant Attorney General

VERIFICATION

STATE OF CONNECTICUT)
) ss. Hartford, Date: April 16, 1999
COUNTY OF HARTFORD)

I, John P. Burke, being duly sworn, depose and say:

1. I am the Banking Commissioner of the State of Connecticut. I am authorized, pursuant to Conn. Gen. Stat. §§ 36a-1 et seq. to administer the provisions of the Banking Law of Connecticut.

2. I have read the Verified Complaint and the contents thereof are true to the best of my knowledge, information, and belief.

3. The sources of my information as to the matters stated in the Verified Complaint emanate from conversations between counsel for the Department of Banking and counsel representing the defendant banks, and records, affidavits, and other documents in the possession of the Department of Banking.

/s/ John P. Burke
John P. Burke

Subscribed and sworn to before me this 16th day of April, 1999.

/s/ Paul A. Bobruff
Commissioner of the Superior Court

Conn. Gen. Stat. § 4-176. Declaratory rulings. Petitions. Regulations

(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.

(b) Each agency shall adopt regulations, in accordance with the provisions of this chapter, that provide for (1) the form and content of petitions for declaratory rulings, (2) the filing procedure for such petitions and (3) the procedural rights of persons with respect to the petitions.

(c) Within thirty days after receipt of a petition for a declaratory ruling, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and to all persons who have requested notice of declaratory ruling petitions on the subject matter of the petition.

(d) If the agency finds that a timely petition to become a party or to intervene has been filed according to the regulations adopted under subsection (b) of this section, the agency: (1) May grant a person status as a party if the agency finds that the petition states facts demonstrating that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency proceeding; and (2) may grant a person status as an intervenor if the agency finds that the petition states facts demonstrating that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings. The agency may define an intervenor's participation in the manner set forth in subsection (d) of section 4-177a.

(e) Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168 on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

(f) A copy of all rulings issued and any actions taken under subsection (e) of this section shall be promptly delivered to the petitioner and other parties personally or by United States mail, certified or registered, postage prepaid, return receipt requested.

(g) If the agency conducts a hearing in a proceeding for a declaratory ruling, the provisions of subsection (b) of section 4-177c, section 4-178 and section 4-179 shall apply to the hearing.

(h) A declaratory ruling shall be effective when personally delivered or mailed or on such later date specified by the agency in the ruling, shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183. A declaratory ruling shall contain the names of all parties to the proceeding, the particular facts on which it is based and the reasons for its conclusion.

(i) If an agency does not issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, or within such longer period as may be agreed by

the parties, the agency shall be deemed to have decided not to issue such ruling.

(j) The agency shall keep a record of the proceeding as provided in section 4-177.

(3)

Supreme Court, U.S.
FILED
MAY 21 1999
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No. 98-1661

In The
Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,
Petitioner.

v.

THE HONORABLE JOHN P. BURKE,
BANKING COMMISSIONER OF THE STATE OF
CONNECTICUT AND CONNECTICUT DEPARTMENT OF
BANKING, A STATE AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES

The caption of the case contains the name of all parties to the case. Petitioner, Fleet Bank, National Association is associated with only one publicly-traded corporate entity, its corporate parent, Fleet Financial Group, Inc. Petitioner has no nonwholly owned subsidiaries.

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A. The Commissioner's Opposition Casts No Doubt Upon The Reasons Fleet Presented In Support of a Grant of Certiorari

The Commissioner's Opposition ("Opp.") is more noteworthy for what it does not say than for what it does.

1. Fleet's Petition established that the Second Circuit's holding--that the federal courts lose federal question jurisdiction over a claim of statutory preemption when the complaint also includes a related challenge under state law--conflicts with decisions in nine other circuits. The Commissioner does not cite any of these cases, much less dispute that a square conflict exists.[1] That conflict calls for resolution by this Court.

2. Fleet's Petition explained that that circuit conflict concerns an issue of broad and recurrent importance, one that has arisen in litigated cases in such varied areas as telecommunications, environmental protection, housing regulation, aviation, tobacco advertising, energy regulation and securities law. (*See* Pet. at 12-17 & n.15.) The Commissioner's silence in response implicitly concedes the breadth and importance of the circuit conflict.

3. Fleet's Petition demonstrated that the decision below conflicts with congressional determinations embodied in 28 U.S.C.§ §1331 and 1367, and with decisions of this Court, particularly *City of Chicago v. International College of Surgeons*, ___ U.S. ___, 118 S.Ct. 523 (1997). The Commissioner essentially makes no effort to show that the decision below can be reconciled with those

---

[1]His only gesture in this regard is to state that "a number" of the conflicting decisions had "a jurisdictional basis under § 1983." (Opp. at 15 n.10). That statement falls short in three ways. First, even on its own terms it fails to distinguish conflicting decisions that do not rest on § 1983. Second, § 1983 is not a jurisdictional grant but a federal cause of action, one that a federal court may hear only under a grant of subject matter jurisdiction like § 1331 or § 1343(3), and the Second Circuit's reasons for thinking that jurisdiction was "ill-advised" would apply whether the federal claim was viewed as arising under § 1983 or directly under the National Bank Act. Third, as our Petition notes, although Fleet's Complaint did not refer to § 1983, it adequately stated facts supporting a § 1983 claim. (*See* Pet. at 25 n.19.)

authorities.[2]

Thus, the Commissioner does not contest the core propositions underlying Fleet's Petition: that the decision below creates a circuit conflict on a basic and recurrent issue of federal jurisdiction, and that it cannot be reconciled with governing statutory and judicial authorities.

B. The Commissioner's Reasons for Denying the Writ Miss the Point

What, then, are the Commissioner's arguments against granting review?

1. First, he suggests that Fleet "has failed to identify any legal issue that cries out for this Court to determine," because the pending proceedings before a state agency, a state court and the federal district court provide ample opportunities to determine the legality of the Commissioner's efforts to ban ATM fees. (Opp. at 4.) That suggestion misunderstands the basis for Fleet's Petition, which seeks review not of substantive questions of banking law, but of this jurisdictional question: "Does a federal court lose its jurisdiction under 28 U.S.C. § 1331 to hear a claim that federal law preempts official action if the plaintiff also alleges that the official action is not authorized under state law." That question cannot be resolved by a Connecticut state tribunal. And absent correction by this Court, the erroneous decision below would remain the law in the Second Circuit, to be applied in a myriad of other areas even were the substantive legality of a ban on ATM fees to be resolved.

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[2]The Commissioner merely asserts that "[t]he petitioner's claim that the judgment below conflicts with 28 U.S.C. § 1367 or with any of this Court's decisions under it is entirely manufactured"(Opp. at 6)--an assertion supported only by a contention that *College of Surgeons* is distinguishable because "there, unlike this case, there *was* an independent basis for federal question jurisdiction, which permitted the federal court to adjudicate a properly submitted supplemental claim." (Opp. at 6 n.3.) That is no distinction at all: Fleet's Complaint asserted a federal preemption claim which, under *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), provided an independent basis for federal question jurisdiction. (*See* pp. 8-9, *infra*.)

Fleet asserts a right, conferred by Congress in §§ 1331 and 1367, to have its substantive claims determined in a federal court. To respond that those claims can be decided in another forum thus misses the point. Indeed, were this Court to accept the Commissioner's argument, it would never review an erroneous denial of federal jurisdiction, for the plaintiff virtually always could get the substantive issues resolved thereafter in a state court proceeding. To state the obvious: a circuit conflict about an important jurisdictional question, no less than one concerning a substantive issue, is an appropriate occasion for the grant of certiorari.

2. The Commissioner next asserts that Fleet was really seeking federal court determination of a state law issue, and tried "to manufacture jurisdiction" by raising a preemption claim. (Opp. at 2.) Fleet's Complaint and the law it invokes thoroughly refute this characterization. The Complaint avers that "the Connecticut ATM statutes are preempted by 12 U.S.C. § 24 (Seventh) to the extent that these statutes are interpreted to prohibit Fleet from" charging ATM fees, and it prays for a declaration that "the National Bank Act conflicts with and preempts the Connecticut ATM statutes" and an injunction against the statutes' enforcement. (App. A81, A82.) This allegation and request for relief state a federal question. That question confers §1331 jurisdiction on the District Court unless the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

The Opposition does not and could not contend that Fleet's federal claim is "immaterial" or "wholly insubstantial." The National Bank Act grants Fleet "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 (Seventh), and both federal regulations[3] and Fleet's federal regulator[4]

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[3]*See* 12 C.F.R. § 7.1019 (1999)(authorizing national banks to use electronic means, such as automated teller machines, to conduct business); 12 C.F.R. § 7.4002 (1999)(permitting national banks to impose charges, other than interest, for services banks provide.).

[4]*See* Brief Amicus Curiae of the Office of the Comptroller of the Currency at 3, *Fleet Bank, N.A. v. Burke*, 160 F.3d 883 (2d Cir. 1998)(stating that the imposition of an ATM fee by a national bank

make clear that those powers include the right to charge fees for the use of Fleet's ATM's. As this Court stated in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (citation omitted), "grants of both enumerated and incidental 'powers' to national banks [have been construed] as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." Fleet's preemption claim is anything but frivolous.

As the sole support for his claim that Fleet sought to "manufacture" jurisdiction, the Commissioner observes in outraged italics that Fleet "sought a plaintiff's summary judgment *exclusively* on the state law issue." (Opp. at 3 (emphasis in original)). But the Commissioner himself agreed to that procedure, filing his own motion for summary judgment on the state law question, and the District Court's scheduling order required it. (App. A87, A90.) More importantly, the District Court's jurisdiction depends on the claims made in the Complaint, not on the order in which the Court adjudicates those claims.

3. The Commissioner does not contest Fleet's argument that the decision below conflicts with 28 U.S.C. § 1367. Rather, he seeks to deflect that argument by suggesting that it was first raised in the Petition for Certiorari and should therefore be disregarded. (Opp. at 5-6.)

To the extent that the Commissioner states that Fleet did not rely on supplemental jurisdiction in its briefs to the Second Circuit, his thrust is partially correct but irrelevant. Fleet did not raise supplemental jurisdiction in its main appellate brief because the Commissioner's claims on appeal were that a preemption claim does not support "arising" under jurisdiction, that the District Court should have abstained on the state law issue, and that the District Court's decision on the state law question was wrong. The panel decision was the first time anyone suggested that the presence of a state law question dissolves § 1331 jurisdiction over a federal claim. Fleet's petition for rehearing pointed to the inconsistency between that holding and *College of Surgeons*, a case that discusses supplemental jurisdiction at length. Fleet's argument here is better elaborated than in its petition for rehearing, but that fact does not bar Fleet from

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"is authorized under federal law.")

presenting it to this Court.[5]

To the extent that the Commissioner claims that Fleet cannot rely on the inconsistency between the doctrines of supplemental jurisdiction and the holding below because Fleet did not explicitly plead supplemental jurisdiction in its Complaint, his contention is both wrong and irrelevant. Contrary to the Commissioner's argument (Opp. at 5), it is not the law that the statutory basis of jurisdiction must be specifically alleged in a complaint. Rather, what must appear in a complaint are facts sufficient to establish jurisdiction.[6] As Judge Friendly observed, this is especially true in connection with pendent jurisdiction, "since the court already has jurisdiction over the case." *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809 (2d Cir. 1971). *Accord, e.g.*, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1207 at 97 (2d ed. 1990). Fleet's Complaint seeking relief under both the federal preemption doctrine and state law adequately pleaded supplemental jurisdiction over the state law issue.

Moreover, The Second Circuit did not hold, and the Commissioner does not contend, that the District Court incorrectly exercised jurisdiction over the state law question; it held that because of the state law question, the District Court had no jurisdiction over the federal question Fleet presented. The issue here is not whether the District Court had jurisdiction to decide the state law question, or whether it should have abstained from doing so,[7] but whether its jurisdiction over the federal preemption claim dissolved because of the state law issue. In evaluating the correctness of the Second Circuit's novel holding, this Court can and should look to the inconsistency between that holding and the principles of pendent jurisdiction it has enunciated and Congress has enacted in § 1367.

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[5]A petition for rehearing is, after all, not a mandatory precursor to a petition for certiorari.

[6]*E.g.*, *Love v. United States*, 915 F.2d 1242, 1249 (9th Cir. 1980) ("no jurisdiction-conferring provision need be specifically pleaded, as long as the Complaint sets forth facts giving the court jurisdiction;") 5 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1206 at 90 (2d ed. 1990).

[7]The Second Circuit did not reach that question.

C. The Commissioner's Efforts to Defend the Judgment Below Fall Short

Although the Commissioner makes no effort to defend the Second Circuit's conclusion that acknowledged jurisdiction over a federal preemption claim dissolves when that claim is joined with a state law claim under the challenged statute, his final argument is that the decision below was correct. Even if the Commissioner's alternative grounds for supporting the holding below were colorable, this Court should grant certiorari to resolve the conflict between the Second Circuit and the nine other circuits which have upheld jurisdiction in similar cases. The fact that the Commissioner and the Second Circuit are wrong provides added reason for this Court to review the decision below.

1. The Commissioner's first argument in defense of the Second Circuit's holding is that the District Court should not have ruled on the question of state law. (Opp. at 7-8.) This argument is disingenuous, since the Commissioner agreed in the District Court to have the state law issue decided before the federal preemption claim. Moreover, it cannot justify the decision below for two independent reasons.

First, established doctrines, of narrow scope, govern when a federal court may refuse to decide a state law claim properly within the court's jurisdiction. Section 1367(c) specifies when supplemental jurisdiction may be declined; neither the Commissioner nor the court below cited that section or suggested that its criteria were satisfied. Similarly, the Commissioner does not contend that the District Court erred in denying his motion to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), on the grounds that the state ATM statutes are not unclear and that Fleet did not present a federal constitutional question that might be avoided by abstention. (App. A57.)

Second, and more fundamentally, a concern about federal adjudication of state law issues could at most justify refusal to decide the state law claim, leaving intact Fleet's federal preemption claim and federal question jurisdiction under § 1331. That concern cannot, however justify the decision that the Second Circuit made--to dismiss Fleet's action in its entirety, including its federal claim under the

National Bank Act.[8]

2. The Commissioner next contends that the Second Circuit correctly applied the well-pleaded complaint rule, which precludes federal jurisdiction "if a federal question is merely asserted or anticipated as a defense to a state law claim." (Opp. at 9, *quoting Louisville & Nashville RR. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). That proposition is correct--but note the importance of the word "merely". The Commissioner fails to understand that federal law may be either a defense or the basis of an affirmative claim for injunctive relief--either a shield or a sword. If this case were one in which the Commissioner had sued Fleet in state court, Fleet could not have removed it on the ground that it had a federal preemption defense, under the National Bank Act, to the state court enforcement action.

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[8]Much the same response can be given to a point stated without further explanation in this one sentence in the Opposition: "Further, the Eleventh Amendment prevents a federal court from granting injunctive relief against a state official on the basis of state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984)." (Opp. at 7-8.) As this Court noted in *Wisconsin Dep't of Corrections v. Schacht*, ___ U.S. ___, 118 S. Ct. 2047 (1998), a federal court retains subject matter jurisdiction over a civil action even if one of multiple claims might be barred by the Eleventh Amendment. *Id.* at 2053. Thus, since the *Pennhurst* decision could at most raise a question about federal court adjudication of the claim that the Commissioner's threatened action was unauthorized by Connecticut law, it is no surprise that the Second Circuit, in dismissing the entire action, expressly disavowed reliance on *Pennhurst*. (*See* App. A20 n. 6.)

Equally important, the Eleventh Amendment cannot, at this juncture, justify dismissal of the state law claim. The Commissioner did not raise the Eleventh Amendment in his Answer to the Complaint, his Motion to Dismiss, or any other pleading or motion. Nor did he invoke that immunity before the panel of the Court of Appeals or in his opposition to Fleet's petition for rehearing and suggestion for rehearing en banc. As the Second Circuit observed, it is too late for him to do so now. (App. A20 n. 6.) *See Schacht*, 118 S. Ct. at 2054-57 (Kennedy, J., concurring).

But the National Bank Act (like other federal statutes and federal constitutional provisions) can equally well be the basis for an affirmative claim to enjoin enforcement of a preempted state law. *See Barnett Bank of Marion County, N.A. v. Nelson, supra.* And in such a case, as *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), clearly stated, it is

> beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96, n.14.

3. Struggling to distinguish *Shaw*, the Commissioner contends that a) *Shaw* is a "complete preemption" case; b) complete preemption has been recognized only in limited areas, including suits under ERISA, the subject matter involved in *Shaw*; and c) thus *Shaw* cannot support jurisdiction over Fleet's preemption claim under the National Bank Act, which, unlike ERISA, does not completely preempt state law.

The argument fails in its initial premise--that *Shaw* is a complete preemption case. Indeed, as the court below noted, the Shaw opinion "made no reference to the 'complete preemption' doctrine." (App. A10-A11.) That silence is all the more telling because in a companion decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), handed down the same day as *Shaw*, this Court did discuss the complete preemption doctrine at length. *See id.* at 22-27.

Although in the sixteen years since it was decided, *Shaw* has been cited literally hundreds of times by federal courts and discussed extensively in secondary literature, the Commissioner fails to point to a single judge or commentator who reads *Shaw* as having rested on the complete preemption doctrine.[9] Rather, *Shaw* has consistently

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[9]A cursory examination of the complete preemption doctrine shows its lack of applicability to the facts of *Shaw* or of this case. The doctrine applies when a *state court* complaint purports to allege only a *state law* claim, but "the pre-emptive force of [federal law] is so powerful as to displace entirely any state cause of action" and to

been understood as "indicating that ordinarily a person claiming immunity from state regulation may bring a federal court action under § 1331 seeking injunctive relief. " Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 947 (4th ed. 1996). This Court has consistently followed that understanding of *Shaw*, deciding under the federal question jurisdiction numerous actions like Fleet's that seek injunctive relief against state regulation alleged to be preempted by federal statutes. *See, e.g., Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996) (National Bank Act); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (OSHA); *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495 (1988) (federal energy regulations); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (Natural Gas Act).

4. A final point about the Commissioner's discussion of the decision below again highlights what he does *not* say: he does not defend the actual holding of the Second Circuit. For the court below, unlike the Commissioner's Opposition, acknowledged, albeit grudgingly, that under *Shaw* it would have subject matter jurisdiction had Fleet alleged *only* its federal statutory preemption claim. (App. A18.) The Second Circuit's precise holding was that such federal question jurisdiction evaporated because Fleet joined to its federal preemption claim a related state law claim that the Commissioner's action was unauthorized. (App. A.23.) The Commissioner does not explain how this novel theory of jurisdictional evaporation can be squared with the plain admonition in *City of Chicago v. International College of Surgeons*, *supra*, that

[n]othing in the jurisdictional statutes suggests that

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make "[a]ny such suit . . . purely a creature of federal law," *Franchise Tax Board*, 463 U.S. 1, 23 (1983); *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393(1987); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 376 U.S. 557 (1968). In these circumstances, removal is proper "even though no federal question appears on the face of the plaintiff's complaint." *Rivet v. Regions Bank of Louisiana*, ___ U.S. ___,118 S.Ct. 921, 925 (1998). By contrast, in both *Shaw* and in this case, the Complaint was filed not in state but in *federal court*; the Complaint expressly asserted a *federal law* claim; and the plaintiff was seeking to invoke, not to evade, federal question jurisdiction.

> the presence of related state law claims somehow alters the fact that [the] complaints, by virtue of their federal claims, were 'civil actions' within the federal courts' 'original jurisdiction.'

118 S. Ct. at 530 (citation omitted).[10] Nor does he explain how the Second Circuit's view that subject matter jurisdiction over Fleet's case was "ill-advised" can be squared with Congress's decision to give federal courts, in federal question cases, supplemental jurisdiction to the full extent authorized by Article III, see 28 U.S.C. § 1367(a), and with a federal court's duty to exercise the jurisdiction that Congress has conferred.

CONCLUSION

The Second Circuit has decided an important issue of federal jurisdiction in a manner that is undisputedly in conflict with the decisions of nine other circuit courts of appeals. The Second Circuit's decision is also inconsistent with the opinions of this Court and with the decisions made by Congress in §§ 1331 and 1367 as to how federal courts should treat state law claims pendent to federal question claims. The Commissioner has made no effort to dispute the divergence of the Second Circuit's course. The effort the Commissioner does make to defend the holding below is simply wrong.

This Court should grant its writ of certiorari to review the decision of the Second Circuit in order to restore uniformity among the circuits as to the reach of district court jurisdiction.

Respectfully submitted,

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[10] *See* note 2, *supra*.

(4)

Supreme Court, U.S.
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No. 98-1661

In The

Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

The respondents submit this supplemental brief pursuant to Supreme Court Rule 15.8, which permits "any party to file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to . . . intervening matter not available at the time of the party's last filing."

In its opposition to the petition for a writ of certiorari, the respondents pointed out to this Court that the petitioner, Fleet Bank, N.A., and the respondent Commissioner are presently engaged in litigation in the federal district court and court of appeals (in an action the petitioner filed after this one), as welll as in Connecticut state court. In these proceedings the parties are in dispute over several issues related to whether the petitioner and other national banks may impose ATM surcharge fees in Connecticut.

Since the respondent filed its opposition, the petitioner has filed yet another motion for a preliminary injunction in the federal district Court, seeking once again to enjoin the respondent Commissioner from proceeding under state law to prevent the imposition of such fees. (*See* Appendix) By its own hand, therefore, the petitioner has again increased the already high likelihood that the issues surrounding the legality of ATM surcharge fees in Connecticut will be resolved in one of the Nation's "inferior courts," state or federal. From either party's point of view, that will moot *this* case, despite the fact that the proceedings in those courts do not raise the jurisdictional issue the petitioner asks this Court to consider.

It hardly needs to be said that this Court does not exist to indulge the parties' academic interests. Rather, it is more consistent with this Court's practice and prudence to

await one of the "myriad" cases the petitioner itself claims the opinion below will apply to, in which the parties will more likely remain at issue over the question presented.

Respectfully submitted,

RESPONDENTS

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In The
Supreme Court Of The United States
October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX TABLE OF CONTENTS

First Union National Bank v. The Honorable John P. Burke/Fleet National Bank v. The Honorable John P. Burke; Civil Action No. 3:98CV02171(JBA); Plaintiff Banks' Joint Motion For a Temporary Restraining Order and/or Preliminary Injunction A2

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FIRST UNION NATIONAL BANK	:	
Plaintiff	:	
v.	:	**CIVIL ACTION NO.**
	:	**3:98CV02171(JBA)**
THE HONORABLE JOHN P. BURKE,	:	
acting in his official capacity as	:	
Banking Commissioner of the State of	:	
Connecticut,	:	
Defendant	:	
	:	
FLEET NATIONAL BANK,	:	
Plaintiff	:	
	:	
v.	:	
	:	
THE HONORABLE JOHN P. BURKE,	:	
acting in his official capacity as	:	
Banking Commissioner of the State of	:	
Connecticut,	:	
Defendant	:	**May 17, 1999**

PLAINTIFF BANKS' JOINT MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, First Union National Bank ("First Union") and Fleet National Bank ("Fleet") hereby moves this Court, on the basis of the legal assertions in their respective amended complaints (collectively the "Amended Complaints") and the supporting factual affidavits of, in the case of First Union, Daniel Glassberg, and, in

the case of Fleet, Robert B. Hedges, Jr. and Nandina Bahkski (the foregoing affidavits of Ms. Bahkski and Messrs. Glassberg and Hedges being hereinafter collectively referred to as the "Affidavits"), to enter an order against the defendant, The Honorable John P. Burke, acting in his official capacity as Banking Commissioner of the State of Connecticut (the "Commissioner"), temporarily restraining and enjoining the Commissioner, as well as any other person acting in concert with him or pursuant to his direction, from prosecuting, maintaining or commencing any state court enforcement, restitution, or injunctive proceedings against Fleet or First Union with respect to the matters referred to in said amended complaints. First Union and Fleet additionally request, pursuant to Rule 65, that the Court enter a preliminary injunction against the Commissioner under these same terms.

In support of this motion, First Union and Fleet (collectively, the "Banks") state as follows:

1. The Banks ae national banking associations organized under the subject to the laws of the United States. They each maintain ATMs throughout the State of Connecticut

2. As more particularly described in the Amended Complaints and the Affidavits, the Banks seek to charge non-depositor customers of their respective ATMs for such non-depositor customers' use thereof.

3. The Banks' right to maintain ATMs and to charge non-depositors for their use is permitted under federal law, specifically, 12 U.S.C. §24 (Seventh), and the Banks' principal federal regulator, the Office of the Comptroller of the Currency ("OCC"), has expressly so opined.

4. The OCC's interpretation of the National Bank Act is entitled to substantial deference.

5. On or about November 12, 1998, the Banks sought a preliminary injunction from this Court, which injunction sought to "restrain [] and enjoin [] the Commissioner, as well as any and all persons acting in concert with him or pursuant to his direction, from acting in any way to prevent, impede, or interfere with [their] assessment and collection of charges for the use of [their respective] automatic teller machines (ATMs) by [their respective] non-depositor customers . . . including, but not limited to, the institution of state court enforcement or declaratory judgment proceedings . . . ".

6. The OCC subsequently intervened in this action and filed its own motion for an injunction against the Commissioner. Specifically, the OCC sought to enjoin the Commissioner "from instituting any enforcement activities against national banks, except for the purpose of enforcing State unclaimed property or escheat laws, or as otherwise authorized by federal law."

7. On April 7, 1999, this Court issued a ruling on the OCC's request for an injunction. In particular, the Court enjoined the Commissioner "from proceeding with his pending administrative enforcement proceeding against [the Banks] pending final disposition of the OCC's complaint." Importantly, however, this Court's order did not "address the Commissioner's intepretation of the ATM statute in dispute, Conn. Gen. Stat. § 36a-156, nor [did] it preclude . . . the Commissioner from further seeking enforcement through judicial means." Finally, this Court's ruling also opined that the Banks' then pending motions for a preliminary injunction should be denied as moot.

8. On April 14, 1999, The Banks filed a motion for reconsideration with respect to the denial of their motions for preliminary injunction.

9. On April 19, 1999, the Commissioner instituted a new state court proceeding, viz. Burke v. Fleet National Bank, First Union National Bank and BankBoston, N.A., Connecticut Superior Court, Judicial District of Hartford, Docket No. CV-99-588717 ("*Burke v. Fleet*"). A copy of the complaint filed by The Commissioner in *Burke v. Fleet* is attached hereto as Exhibit A.

10. The Commissioner has requested a temporary injunction in *Burke v. Fleet*, which injunction is scheduled to be heard on June 1, 1999.

11. On April 21, 1999, this Court denied the Banks' motion for reconsideration with respect to this Court's earlier mootness determination regarding their previously pending motions for a preliminary injunction. Specifically, this Court opined that it could not grant the relief requested because, in the limited context of a motion for reconsideration, neither of the Banks had demonstrated an intervening changing in controlling law, new evidence, or the need to corret a clear error of law or to prevent manifest injustice.

12. The Commissioner's institution of *Burke v. Fleet* raises anew the issue of his interference with the Banks' claimed federal rights. Specifically, the Commissioner, by commencing and maintaining *Burke v. Fleet*, clearly intends to act so as to interfere with the Banks' exercise of their valid federal rights to maintain ATMs and to charge non-depositors for their use. Moreover, this Court's ruling on the OCC's motion for a preliminary injunction did not address the Banks' Section 1983 claims, which claims have, once again, been placed squarely at issue by the Commissioner's latest filing.

13. Based upon the matters set forth in the Anended Complaints and the Affidavits, the Banks are reasonably

likely to prevail on the merits of the claims therein described.

14. Moreover, if the Commissioner is permitted to further prosecute *Burke v. Fleet* (or any other related or similar state court proceedings) or to obtain an injuntion against the Banks before this Court can act, First Union and Fleet will sustain irreparable harm in that the Commissioner will be permitted to unlawfully invoke inapposite and/or invalid state judicial mechanisms to defeat, or to attempt to defeat, the conferral of a valid right under federal alw.

15. No irreparable harm will be experienced by the Commissioner or by non-depositor customers as a result of the maintenance of the status quo since the Banks will not levy non-depositor customer fees during the pendency of the Temporary Restraining Order. For this reason, the Banks should similarly be relieved of the obligation to post any bond in connection with this court's order of the relief herein requested. Likewise, the Banks' ability to arrange for repayment of any fees, if later determined necessary, should relieve them of the obligation to post a bond regarding a preliminary injunction.

16. For the same reasons, the public interest will not be disturbed by the issuance of a Temporary Restraining Order or preliminary injunction.

17. Lastly, since any temporary restraining order issue pursuant hereto must, unless extended for good cause, expire no later than ten days following its issuance, Fed. R. Civ. P. 65(b), the Banks also request that their accompanying motion for preliminary injunction be set down for hearing prior to the expiration of any such order.

WHEREFORE, First Union and Fleet ask that this Court enter a temporary restraining order and a preliminary

injunction against the defendant, The Honorable John P. Burke, acting in his official capacity as Banking Commissioner of the State of Connecticut, enjoining the Commissioner, as well as any other person acting in concert with him or pursuant to his direction, from prosecuting, maintaining or commencing any state court enforcement, restitution, or injunctive proceedings against Fleet or First Union with respect to the matters referred to in said Amended Complaints.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing was sent by overnight courier service to:

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